SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934

No.

R. R. GROVEY, PETITIONER,

vs.

ALBERT TOWNSEND.

ON PETITION FOR A WRIT OF CERTIORARI TO THE JUSTICE COURT, PRECINCT NO. I, HARRIS COUNTY, TEXAS.

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[fols. a, 1 & 2] [Caption omitted]

[fol. 3]

IN THE JUSTICE COURT, PRECINCT NO. 1, POSITION NO. 2, HARRIS COUNTY, TEXAS

No. 63,915

R. R. GROVEY, Plaintiff,

vs.

ALBERT TOWNSEND, Defendant

PLAINTIFF'S ORIGINAL PETITION—Filed Sept. 10, 1934

To the Honorable Justice of said Court:

Now comes the plaintiff, R. R. Grovey, and complaining of the defendant, Albert Townsend, respectfully shows to this Honorable Court as follows:

I

That the plaintiff, R. R. Grovey, is a natural born citizen and resident of the United States, State of Texas, and Harris County in said State, and has been such resident of Harris County, Texas, for a period of eighteen (18) years, next preceding the filing of this petition.

That the plaintiff, R. R. Grovey, is forty-four (44) years of age, is a member of the Negro race, has resided in voting precinct No. 85 in Harris County, Texas, for a period of four (4) years next preceding the holding of the statutory democratic primary election involved in this case; that plaintiff paid his poll tax for the year 1933 on the 31st day of January, A. D. 1934 as required by the laws of the state of Texas, and holds his official receipt No. 40712 therefor; that plaintiff is and was on July 9, 1934, a duly qualified elector under the laws of the United States and the state of Texas, and is and was on July 9, 1934, subject to none of the disqualifications provided for voting under the constitution and laws of the State of Texas; that plaintiff [fol. 4] is and was on July 9, 1934, a member of and a believer in the tenets of the Democratic Party.

II

That Article 3101 and Article 3102 of the Revised Civil Statutes of Texas provide as follows:

Art. 3101. (3084) Nominated at Primary

On primary election day in 1926, and every two years thereafter, candidates for Governor and for all other State offices to be chosen by vote of the entire State, and candidates for Congress and all district offices to be chosen by the vote of any district comprising more than one county, to be nominated by each organized political party that cast one hundred thousand votes or more at the last general election, shall, together with all candidates for offices to be filled by the voters of a county, or of a portion of a county, be nominated in primary elections by the qualified voters of such party. (Acts 1st C. S. 1905, p. 549.)

Art. 3102. (3086) Date of Primary

The fourth Saturday in July 1926, and every two years thereafter shall be general primary election day, and primary elections to nominate candidates for a general election shall be held on another day, except when specially authorized. No person shall be declared the nominee of any political party at any primary election for any State or District office unless he has complied with every requirement of all laws applicable to primary and other elections, [fol. 5] and has received a majority of all the votes cast at such primary elections for all candidates for such office. If at the general primary election for any political party, no candidate becomes the nominee for any State or district office under this article, a second primary election shall be held by such political party, in the State, or such district, or districts, as the case may be, on the fourth Saturday in August succeeding such general primary election, and only the name of the two candidates who receive the highest number of votes for any office for which nomination was made at the general election shall be placed on the official ballot as candidates for such office at such second primary. The second primary election shall be conducted according to the law prescribed for conducting the general primary election, and the candidates receiving a majority of all votes cast for the office to which they aspire shall be declared the

nominee for their respective offices. Any political party may hold a second primary election on the Fourth Saturday in August to nominate candidates for any county precinct office, where a majority vote is required to make nomination; but at such second primary election only the two candidates who received the highest number of votes at the general primary for the same office shall have their names placed upon the official ballot. Nominations of candidates to be voted for at any special election shall be made at a primary election at such time as the party executive committee shall determine, but no such committee shall ever have the power to make such nominations. All precincts in the same county and all counties in the same [fol. 6] district shall vote on the same day. Nominations of party candidates for offices to be filled in a city or town shall be made not less than ten days prior to the city or town election at which they are to be chosen, in such manner as the party executive committee for such city or town shall direct, and all laws prescribing the method for conducting county primary elections shall apply to them. (Id. Acts 4th C. S. 1918, p. 191.)

That pursuant to and in accordance with and in keeping with the mandatory requirements of the said articles 3101 and 3102, there was held on the 28th day of July, A. D. 1934, a statutory Democratic primary election, which was wholly statutory and governed by Title Fifty of the Revised Civil Statutes of Texas, and that the plaintiff, by reason of matters and things set out in this petition, had the legal right to vote in said election, and that said legal right to vote in said election, was and is protected and guaranteed by the 14th and 15th Amendments to the Constitution of the United States.

III

That the defendant, Albert Townsend, is and was on the 9th day of July, A. D. 1934, the duly elected, qualified and acting county clerk in and for Harris County, Texas, elected pursuant to Article 1935 and other pertinent provisions of the Revised Civil Statutes of the State of Texas, and as such county clerk, was on such day, and is now, and has been at all the times material in this law suit subject to

[fol. 7] Article 2956 of the Revised Civil Statutes of the State of Texas, which, as amended, reads as follows:

Art. 2956. Absentee Voting

Any qualified elector, as defined by the laws of this State, who expects to be absent from the County of his or her residence on the day of election may vote subject to the following conditions, to-wit: At some time, not more than twenty (20) days nor less than three (3) days, prior to the date of such election, such elector shall make his or her personal appearance before the Clerk of the County of his or her residence and shall deliver to such Clerk his or her poll tax receipt or exemption certificate entitling him or her to vote at such election, and said Clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election, which shall then and there be marked by said elector apart and without the assistance or suggestion of any person, and in such manner as said elector shall desire same to be voted; which ballot shall be folded and placed in a sealed envelope and delivered to said Clerk who shall keep same so sealed, and who shall also keep said poll tax receipt or certificate open to the inspection of any person who may wish to examine or see same until the second day prior to said election; and said Clerk shall, on said second day, place the said poll tax receipt or certificate, together with the said envelope containing said marked ballot, in another envelope which shall then be mailed by said Clerk to the presiding Judge of the voting precinct in which said elector lives. Or, at some [fol. 8] time not more than twenty (20) days prior to the date of such election, such elector shall make his or her written application to the County Clerk of his or her County requesting a ballot, and shall send together with said application his or her poll tax receipt or exemption certificate, but in the event said elector does not have his or her receipt or certificate, the County Clerk is directed to procure from the Tax Collector a certificate in lieu of said receipts or exemption certificates. Such County Clerk receiving the application for a ballot, after verification shall mail a ballot to such elector, which ballot having been prepared in acordance with the law for use in such election, said envelope to be marked "Official Ballot for ——" giving elector's name. Such elector, upon receipt of said

ballot shall mark the same immediately, apart and without the assistance or suggestion of any other person, in such manner as said elector shall desire same to be voted, which ballot shall be folded and placed in a sealed envelope, prepared for the purpose, and mailed by such elector to the County Clerk of the County wherein such elector votes, who shall keep same so sealed, and who shall also keep said poll tax receipts or certificates open to the inspection of any person who may wish to examine or see same until the second day prior to said election; said Clerk shall on said day place the said poll tax receipt or certificate, together with the said sealed envelope containing said sealed ballot, in another envelope, which shall be by said [fol. 9] Clerk then mailed to the presiding Judge of the voting precinct in which said elector lives.

On the day of such election, and in the presence of the election officers, provided by the law, the presiding Judge shall, between the hours of two and three o'clock, open the envelopes containing said poll tax receipts, exemption receipts, and marked ballots, and publicly announce that the ballot of such named electors are proposed to be cast, at which time any person who desires to challenge said vote and the right of same to be cast, shall be heard to present such challenge, and if there be no challenge of same, said vote shall be cast and counted according to law; and if there be any challenge of such vote, legal cause for same shall be heard and decided according to the law provided in the case of such challenge.

In case no challenge is made, such poll tax receipt, after same is marked "voted" as provided by law, shall be mailed back to the said County Clerk. But in the case of challenge, such poll tax receipt together with affidavits relating thereto shall be mailed by said Judge of election of (to) the County Clerk of such County who shall keep same for thirty (30) days, and if no demand be made for the production of same before anybody or persons in authority within said time, said County Clerk shall deliver such receipt to the owners thereof. When voted, the Judge of election shall mark opposite the name of such absentee voter the word "Absentee."

The provisions of this Article shall apply to all elections, [fol. 10] including General, Special and Primary elections, except primary elections ordered by the executive commit-

tee of a political party to nominate candidates for a special election; provided, however, that the executive committee of a political party may at its option provide in ordering a special primary (primary) election to nominate candidates for a special election that any qualified voter who expects to be absent from the County of his residence on the day of the election may vote in accordance with the procedure under either of the methods prescribed in this Act at some time not more than ten days nor less than three days prior to the date of such election. (As amended Acts 1931, 42nd Leg. p. 180, ch. 105; Acts 1933, 43rd Leg. p. 5, ch. 4.)

IV

That on or about the 9th day of July, A. D., 1934 the plaintiff, R. R. Grovey, was a qualified elector as defined by the laws of Texas, and expected to be absent from Harris County, Texas, on July 28, A. D. 1934, and that he did on said date, which was not more than twenty days nor less than three days prior to said July 28, 1934 make his personal appearance before the defendant, Albert Townsend, Clerk of said County of Harris, State of Texas, as aforesaid, and then and there delivered to said defendant, Albert Townsend, County Clerk of Harris County, Texas, his said poll tax receipt mentioned above, and then and there requested said defendant, Albert Townsend, County Clerk of the Harris County, Texas, to deliver to this plaintiff one ballot which had been prepared in accordance with law for use in the statutory Democratic primary election, held on [fol. 11] July 28, 1934, in order that plaintiff might cast an absentee ballot in said election as provided by said Article 2956 of the Revised Civil Statutes of Texas; that the said Albert Townsend was on the said date when this plaintiff appeared before him as aforesaid, conducting absentee voting for said statutory Democratic primary election held on July 28, 1934, in accordance with the provisions of said Article 2956 of the Revised Civil Statutes of the State of Texas.

V

That the defendant, Albert Townsend, although well knowing all of the facts and matters set out above, did refuse on said date to deliver to this plaintiff one ballot which had been prepared in accordance with the law for use in

said statutory Democratic primary election held on July 28, 1934, and that the said defendant, Albert Townsend, is a statutory officer in charge of absentee voting in the said election, and that the said Albert Townsend did refuse to permit this plaintiff to have, or to mark such ballot, or to vote, or to cast an absentee ballot in said election as authorized and required by said Article 2956 of the Revised Civil Statutes of Texas; that the action of the said defendant, Albert Townsend, in refusing to deliver to this plaintiff one such ballot, and in refusing to permit this plaintiff to receive or to mark one such ballot and in refusing and preventing and depriving this plaintiff of his right to vote and cast an absentee ballot in said statutory Democratic primary election held on July 28, 1934, was willful, wrongful, unlawful, and in violation of the rights of plaintiff as hereinafter set forth, and that by reason of such wrong-[fol. 12] fully, willful and unlawful acts of the defendant, Albert Townsend, this plaintiff has been damaged in the sum of ten dollars ($10.00), and said acts of defendant, Albert Townsend, violated plaintiff's rights under the 14th and 15th Amendments to the Constitution of the United States.

VI

That the defendant, Albert Townsend, at the time he refused to permit this plaintiff to cast said absentee ballot, and prevented the plaintiff from casting said absentee ballot, on or about the 9th day of July, A. D. 1934, did then and there give to this plaintiff as his reason and justification for such denial of plaintiff's legal right to vote in said election, the following matters and things, to-wit:

First. A certain purported resolution, passed and adopted by a certain commission or administrative board or agency of government or officials of the State of Texas, created under and by Article 3167 of the Revised Civil Statutes of Texas, and known as the State Democratic Convention of Texas. Said resolution was adopted on the 24th day of May, 1932, and reads as follows:

"Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and the laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."

Second. Certain instructions, which the said defendant, Albert Townsend, claimed he had received from a certain [fol. 13] state commission or administrative board or agency of government or officials of the State of Texas, created by Article 3118 of the Revised Civil Statutes of Texas and known as the County Democratic Executive Committee of Harris County, Texas, by which instructions, said defendant, Albert Townsend, advised this plaintiff that he had been instructed and advised that Negro voters and electors otherwise qualified had no legal right to vote or cast absentee ballots in said election, solely and only on account of their race and color as Negroes, and that since plaintiff was a member of the Negro race, said defendant, Albert Townsend, advised this plaintiff that solely and only because he was a Negro, he could not deliver to plaintiff an absentee ballot and was compelled to prevent plaintiff from casting an absentee ballot, or otherwise voting an absentee vote in said statutory Democratic primary election held on July 28, 1934.

That said purported reasons and justifications were and are no legal excuse for said wrongful and unlawful acts of the defendant in depriving this plaintiff of his legal right to cast an absentee ballot in said statutory Democratic primary elections, and that said wrongful and unlawful acts of the defendant, Albert Townsend, as well as the said reason and justification for said acts constitute a violation of plaintiff's rights under the 14th and 15th Amendments to the Constitution of the United States in that delegates of the power of the State of Texas have discharged their official functions in such a way as to discriminate against [fol. 14] plaintiff on account of his race and color alone, and thereby have denied to this plaintiff the due process of law and the equal protection of laws guaranteed to this plaintiff by the said 14th Amendment to the Constitution of the United States. The said delegates of the state's power have also used their said official functions in such a way as to abridge the right of plaintiff to vote, which is guaranteed to him against abridgment by the 15th Amendment to the Constitution of the United States.

VII

That the above quoted resolution of the State Democratic Convention of Texas and the above mentioned instructions

given to the defendant by the County Democratic Executive Committee of Harris County, Texas, are further void and no legal defense or justification for the wrongful and unlawful acts of defendant in depriving this plaintiff of his legal right to vote, for the following reasons, to-wit:

That Article 3107 of the Revised Civil Statutes of Texas as amended now provides as follows:

"Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party." (Acts 1927, 40th Leg. 1st C. S. p. 193, ch. 67, § 1.)

[fol. 15] That the Supreme Court of Texas has held in the case of Love v. Wilcox, 119 Texas 256, 28 S. W. (2nd) 515 that the said article 3107 is valid and constitutes a prohibition against making former political affiliations or membership in organizations other than the political party a basis for excluding otherwise qualified voters from participating in primary elections in the State of Texas. That by upholding the validity of said Article 3107, the State of Texas has destroyed the untrammeled power of the managers of statutory primary elections in Texas to fix the qualifications for voting or other participation therein and has destroyed the one historical test of party regularity and membership, namely the support of party nominees in past elections.

But that the State of Texas, through a decision of the Supreme Court of Texas, styled Bell et al. v. Hill et al., motion number 11520, decided July 20, 1934, and not yet officially reported, has upheld the validity of the above quoted resolution of the State Democratic Convention of Texas, and the above mentioned instructions of the County Democratic Executive Committee of Texas as a valid exercise of the alleged inherent power of the managers of primary elections in Texas to make race and color a basis of excluding otherwise qualified voters from participation in such elections. That by setting up a discrimination in

granting its protection between classifications of former political affiliations and membership in other organizations than the political party and the classification of race and color, the State of Texas has denied to this plaintiff and [fol. 16] to all other qualified Negro voters the equal protection of the laws and the due process of laws, which are guaranteed by the 14th Amendment to the Constitution of the United States, and has abridged the right of plaintiff and all other qualified Negro voters to vote, in violation of the provisions of the 15th Amendment to the Constitution of the United States.

That in the said case of Bell et al. v. Hill et al., the Supreme Court of Texas did hold that the right of the managers of statutory primary elections in Texas to exclude plaintiff and other qualified Negro voters from voting in such election was guaranteed and protected to such party managers by Sections 2 and 27 of the Bill of Rights (Article 1) of the Constitution of the State of Texas which read as follows:

"Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

"Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

That as so construed, said section 2 and 27 of the Bill of Rights of Texas are void as denying to the classification of [fol. 17] race and color the protection which is guaranteed by said Article 3107 of the Revised Civil Statutes of Texas, to the classifications of past party affiliations and membership or non-membership in organizations other than the political party.

That by reason of all of the above, plaintiff has been denied the equal protection of the laws, and the due process of law guaranteed to him by the 14th Amendment to the

Constitution of the United States, and plaintiff's right to vote guaranteed to him by the 15th Amendment to the Constitution of the United States, has been abridged, and that plaintiff's said constitutional rights have been denied to him by the State of Texas and by agencies vested with the State's power.

Plaintiff further alleges that by a consistent course of statutory enactment and judicial decisions, since the original passage of the statutory primary election laws of Texas in 1903, the State of Texas has deprived the managers of such elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of the State of Texas, except in the one instance where the party managers have been authorized and permitted and protected by said course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections.

VIII

That the Democratic party is a national organization, and that the Democratic party has not passed any rule or resolution or order excluding Negroes, and has not au- [fol. 18] thorized any of its agencies or branches to pass any resolution, rule, or order excluding Negroes, or forbidding Negroes from becoming members of the Democratic party and that no state convention of the Democratic party has the power by virtue of its being, to pass any such rule, resolution, or order, and that the Democratic party has never conferred power upon the State Democratic convention of Texas to pass any such resolution, rule, or order.

IX

That in said statutory Democratic primary election held on July 28, 1934, nominations were made for United States Senator, United States Congressman, Governor of the State of Texas, senators and representatives to the legislature of the State of Texas and other State and County officers, and that it is a matter of common and general knowledge in Texas that such nominations are equivalent to elections to such office and that by reason thereof, which is a matter of general and common knowledge, since plain-

tiff did not get to vote in said election on July 28th, 1934, plaintiff has been fully and effectively disfranchised by the wrongful acts — defendant in depriving plaintiff of his legal right to vote in said election.

X

That the defendant, Albert Townsend, is a State officer of the State of Texas, whose office functions under and by virtue of the laws of the State of Texas and that he was duly elected, pursuant to the election laws of the State of Texas and that the compensation and salary of the defend-
[fol. 19] ant, Albert Townsend, is paid out of the tax money to which the plaintiff has contributed and is required to contribute by the laws of the State of Texas and that in the performance of his functions and duties as county clerk of Harris County and as conductor of absentee voting under said Article 2956 of the Revised Civil Statutes of Texas, the defendant, Albert Townsend, is a state officer and has only public functions to perform.

That the Democratic State Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, are agencies of government, to whom have been committed statutory powers and authority independent of the Democratic party, and that in the conduct of the statutory primary elections required to be held by Articles 3101 and 3102, all of the officials of said elections are state officers, within the constitution of the United States and the case of Nixon v. Condon, 286 U. S. 73.

XI

That by reason of all the matters and things set out above and by reason of the unlawful, wrongful, and wilful acts of the defendant, Albert Townsend, in depriving this plaintiff of his legal right to cast an absentee vote in said statutory Democratic primary election held on July 28, 1934, this plaintiff has been damaged as aforesaid in the sum of ten dollars ($10.00) which he is entitled to recover from said defendant in this action.

[fol. 20] Wherefore, premises considered, plaintiff, R. R. Grovey, prays the Court that the defendant be duly cited to appear and answer this petition and on final hearing

that plaintiff have judgment against defendant for the sum of ten dollars ($10.00) damages and for costs of this suit.

(Signed (R. R. Grovey, plaintiff. (Signed) J. Alston Atkins, (Signed) A. S. Wells, (Signed) Carter Wesley, Attorneys for plaintiff.

Duly sworn to by R. R. Grovey. Jurat omitted in printing.

[File endorsement omitted.]

[fols. 21 & 22] Citation in usual form, showing service on Albert Townsend, omitted in printing.

[fol. 23] IN THE JUSTICE COURT, PRECINCT No. 1, HARRIS COUNTY, TEXAS

[Title omitted]

DEFENDANT'S ORIGINAL ANSWER—Filed Sept. 24, 1934

To the Honorable Judge of said Court:

Now comes the defendant, Albert Townsend, and files this his original answer in this cause.

I

The defendant demurs generally to the plaintiff's petition and says it is insufficient in law and states no cause of action and of this he prays judgment of the court that plaintiff take nothing, and that defendant be discharged with his costs.

II

For further answer if required, the defendant denies all and singular the allegations in the plaintiff's petition and says they are not true in fact and of this he puts himself upon the country; wherefore, defendant prays that plaintiff take nothing and that he be discharged with his costs.

Wherefore, premises considered, defendant prays that he be discharged with his costs and that he have such other

and further relief as he may be entitled to at law or in equity.

(Signed) E. A. Knipp, Attorney for Defendant.

[File endorsement omitted.]

[fol. 24] In the Justice Court, Precinct No 1, Harris County, Texas

No. 63915

R. R. Grovey

vs.

Albert Townsend

Judgment—Filed Sept. 24, 1934

On this the 24th day of September, 1934, came on to be heard the above entitled and numbered cause and came the plaintiff and the defendant by their respective attorneys and a jury having been waived, and the court having heard the pleadings and argument of counsel, and being of the opinion that the petition in this case states no cause of action, the general demurrer is sustained; and plaintiff declining to plead further, this cause is dismissed and judgment entered for defendant, it is, therefore, accordingly ordered, adjudged and decreed, that the plaintiff take nothing by his suit and that the defendant go hence without day.

All costs are adjudged against the plaintiff for which execution may issue.

(Signed) Campbell R. Overstreet, Justice of the Peace, Precinct No. 1, Harris County, Texas.

Okeh as to form:

(Signed) J. Alston Atkins, Attorney for Plaintiff.
(Signed) E. A. Knipp, Attorney for Defendant.

[File endorsement omitted.]

[fol. 25] IN JUSTICE COURT, PRECINCT NO. 1, POSITION NO. 2, HARRIS COUNTY, TEXAS

[Title omitted]

PLAINTIFF'S MOTION FOR A NEW TRIAL—Filed Sept. 25, 1934

To the Honorable Justice of said Court:

Now comes R. R. Grovey, plaintiff in the abeve entitled and numbered cause, and moves the court to set aside the judgment of the court rendered herein on September 24, 1934, which judgment sustained the general demurrer of the defendant to plaintiff's petition and dismissed plaintiff's cause of action and gave judgment for the defendant, and to grant plaintiff a new trial for the following reasons, towit:

I

Because said judgment of the court denies the plaintiff the equal protection of the laws and the due process of law as guaranteed to plaintiff by the 14th Amendment to the Constitution of the United States.

II

Because said judgment of the court denies and/or abridges plaintiff's right to vote as guaranteed to him by the 15th Amendment to the Constitution of the United States.

III

Because said judgment of the court is in violation of the rights, privileges, and immunities guaranteed to plaintiff by the 14th and 15th Amendments to the Constitution [fol. 26] of the United States.

IV

Because said judgment of the court is contrary to the law and the facts as disclosed by the record in this cause.

V

Because the court erred in holding that plaintiff did not have the legal right to cast an absentee ballot in the statutory primary election involved in this case, and in failing to

hold that plaintiff did have such legal right to cast an absentee ballot in the statutory primary election involved in this case.

VI

Because the court erred in holding that plaintiff's petition did not state a cause of action against the defendant and in failing to hold that the petition of plaintiff did state a cause of action against the defendant.

VII

Because the court erred in holding that plaintiff was not entitled to recover damages from the defendant for depriving plaintiff of his legal right to cast an absentee ballot in said election and in failing to hold that plaintiff was entitled to recover damages against the defendant for such deprivation.

VIII

Because the court erred in holding that the resolution of the State Democratic Convention of Texas, adopted May 24, 1932 and quoted on page 7 of plaintiff's petition, was effectual to deprive plaintiff of his legal right to cast an [fol. 27] absentee ballot in such election and in failing to hold that said resolution was without legal force and effect to thus deprive plaintiff of his legal right to cast an absentee ballot in the said election.

IX

Because the court erred in holding that the instructions given the defendant by the County Democratic Executive Committee of Harris County, Texas, and mentioned on page 7 of plaintiff's petition, were a valid justification for defendant's depriving plaintiff of his legal right to cast an absentee ballot in said election, and in failing to hold that said instructions were ineffectual and invalid for said purpose.

X

Because the court erred in holding that the classification "race and color" was not entitled to the same protection of the laws of the State of Texas as given to the classifications of "former political views or affiliations" and "membership or non-membership in organizations other than the

political party" as guaranteed by Article 3107 of the Revised Civil Statutes of Texas, and as upheld by the Supreme Court of the State of Texas in the case of Love v. Wilcox, 119 Texas, 256, 28 S. W. (2nd) 515, and in failing to hold that plaintiff was entitled under the 14th and 15th Amendments to the Constitution of the United States to such protection of the laws of the State of Texas.

[fol. 28]

XI

Because the court erred in holding that Sections 2 and 27 of the Bill of Rights (Article 1) of the Constitution of the State of Texas, as quoted on page nine of plaintiff's petition, and as interpreted by the Supreme Court of Texas in the case of Bell et al v. Hill et al, Motion No. 11520, decided July 20, 1934, but not yet officially reported, were not unconstitutional as being in violation of the 14th and 15th Amendments to the Constitution of the United States, and in failing to hold that said sections were unconstitutional.

XII

Because the court erred in holding that the State of Texas had not, by a consistent course of statutory enactments and judicial decisions denied to qualified Negro voters in the State of Texas their legal right to vote as guaranteed and protected by the 14th and 15th Amendments to the Constitution of the United States, and in failing to hold that the State of Texas by a consistent course of statutory enactments and judicial decisions had denied all qualified Negro voters of their right to vote, or abridged the same.

XIII

Because the court erred in holding that the State Democratic Convention of Texas had and has power by virtue of its being, to say who may and who may not be members of the Democratic Party and in failing to hold that said convention had no such power or authority.

XIV

[fol. 29] Because the court erred in holding that Albert Townsend, defendant in this case, was not and is not a state officer of the state of Texas in conducting absentee voting under Article 2956 of the Revised Civil Statutes of

Texas and in failing to hold that said defendant was and is such officer of the State of Texas in conducting such absentee voting.

XV

Because the court erred in holding that the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, and all other officials conducting statutory primary elections required to be held by Articles 3101 and 3102 of the Revised Civil Statutes of Texas were not and are not state officers or agencies within the meaning of the 14th and *14th* Amendments to the Constitution of the United States, and in failing to hold that said convention and committee and officials were and are such state officers or agencies.

XVI

Because the court erred in holding that the statutory primary election involved in this case was not such an election, the right to vote in which is protected and guaranteed against denial or abridgement by the 15th Amendment to the Constitution of the United States, and in failing to hold that said statutory primary election was such an election.

Wherefore, R. R. Grovey, plaintiff, prays the court that the judgment of the court rendered herein on September 24, 1934, be set aside and that plaintiff be granted a new [fol. 30] trial herein.

(Signed) R. R. Grovey plaintiff. (Signed) J. Alston Atkins, (Signed) A. S. Wells, (Signed) Carter Wesley, Attorneys for Plaintiff.

Duly sworn to by R. R. Grovey. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 31] In Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas

[Title omitted]

Order Overruling Motion for a New Trial—Filed Sept. 25, 1934

On this *Sept.* 25th day of September, A. D. 1934, at a regular term of this court, came on to be heard in this cause

the motion of R. R. Grovey, plaintiff, to set aside the judgment of the court rendered against him in favor of the defendant, Albert Townsend, on the 24th day September, A. D. 1934, in the above entitled and numbered cause, and to grant plaintiff a new trial herein, and said motion having been duly heard and considered by the court, the court is of the opinion and finds that said motion for a new trial should be overruled.

It is therefore considered, ordered, and adjudged by the court that said motion for a new trial herein be, and the same is hereby overruled, to which said judgment and ruling of the court, plaintiff then and there excepted, and plaintiff's exceptions were and are allowed.

(Signed) Campbell R. Overstreet, Justice of the Peace, Precinct No. 1, Position No. 2, Harris County, Texas.

OK as to form.

(Signed) J. Alston Atkins, Att'y for Plff. (Signed) E. A. Knipp, Att'y for Deft.

[File endorsement omitted.]

[fol. 32] Bond on petition for certiorari for $20.00, approved Sept. 25, 1934, omitted in printing.

[fol. 33] Bill of costs omitted in printing.

[fol. 34] Reporter's Certificate to foregoing transcript omitted in printing.

[fols. 35 & 36] Justice's Certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 14, 1935

The petition herein for a writ of certiorari to the Justice Court, Precinct No. 1, Harris County, State of Texas, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND.

PETITION FOR WRIT OF CERTIORARI TO JUSTICE COURT, PRECINCT No. 1, POSITION No. 2, HARRIS COUNTY, TEXAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, R. R. Grovey, hereby respectfully applies for a Writ of Certiorari, whereby the Justice Court, Precinct No. 1, Position No. 2, in and for the County of Harris and State of Texas, will be required to certify to this Honorable Court for its review the transcript of record in the case entitled "R. R. Grovey, plaintiff, vs. Albert Townsend, defendant, No. 63,915," in which the said Justice Court, on September 24, 1934, sustained the general demurrer of respondent to petitioner's petition, dismissed petitioner's suit, and rendered judgment in favor of respondent, and in which said Justice Court on September 25, 1934, over-

ruled the petitioner's motion for a new trial; petitioner's petition and action being to recover damages from respondent for his wrongful refusal to permit petitioner to cast an absentee vote in a statutory Democratic primary election, for which respondent was the statutory official in charge of absentee voting. In support hereof, under Section 344 (b), Title 28, U. S. Code, Judicial Code, Section 237 (b), your petitioner respectfully alleges:

First. This is the fourth time that a Negro citizen has found it necessary to apply to this Honorable Court for the protection of his civil right to vote in the statutory Democratic primary elections of Texas.

(*a*) In *Love* v. *Griffith* (decided October 20, 1924), 266 U. S. 32, the question was moot before it reached this Court, but this Court said that "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

(*b*) In *Nixon* v. *Herndon* (decided March 7, 1927), 273 U. S. 536, the question was not moot and the Negro's constitutionally protected civil right to vote in the statutory Democratic primary elections of Texas was established beyond doubt and a Texas statute which sought to destroy the right was declared unconstitutional, this Court saying that "it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the *right* set up in this case." (Italics ours.)

(*c*) *Nixon* v. *Condon* (decided May 2, 1932), 286 U. S. 73, arose when, taking refuge behind the rule that the Fourteenth and Fifteenth Amendments are restraints upon the States and not upon private individuals, another Texas statute passed as was said because of "an emergency and imperative public necessity" created by *Nixon* v. *Herndon*, *supra*, "lodged the power" (as this Court found in *Nixon*

v. *Condon, supra*) in the State Democratic Executive Committee of Texas to deprive Negroes of their civil right to vote in the Texas statutory Democratic primary elections. This Court held that the State Committee was an organ "of the State itself" and laid down the broad rule that (p. 88) "Whether, in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this Court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere."

(*d*) Following the second *Nixon* case, Negroes were again deprived of their civil right to vote in the statutory Democratic primary elections of Texas, and the instant case presents the fourth challenge to the constitutionality of that deprivation, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Resolution Involved.

Second. In *Nixon* v. *Condon, supra,* as proof that the State Democratic Executive Committee of Texas had no power by virtue of its being to say what citizens could become Democrats and what citizens could not, this Court made the following statement at page 84: "Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. Bryce, Modern Democracies, Vol. 2, p. 40." (Italics ours.)

Assuming that the Democratic Party is a "state political party"—which petitioner alleges that it is not—and placing a favorable significance upon the word "Whatever" in the above quotation from this Court, the State Democratic Convention of Texas promptly passed, on May 24, 1932, the following resolution (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitu-

tion and Laws of the State shall be eligible to membership in the Democratic party and as such eligible for participation in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113, and *Mason* v. *Committee*, 74 S. W. (2d) 326, where this difference in reading of resolution may be found.

State Constitutional Provisions and Court Decisions Challenged in Instant Case.

Third. Since its adoption and the deprivation under its authority of the legal right of Negroes to vote in the statutory Democratic primary elections of Texas, the above resolution has been before two Texas Courts of Civil Appeals and the Supreme Court of Texas. *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123; *Bell* v. *Hill*, 74 S. W. (2d) 113; and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326. These cases are tacitly relied upon by the court below as authority for the judgment in the instant case.

(*a*) In the Booker Case (Cobbs, J., dissenting) the Court of Civil Appeals at San Antonio, through Special Justice Searcy, thought that its decision upholding the resolution was "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*." Expressing the same thought the late Chief Justice Fly, in a concurring opinion, said (p. 129) that *Nixon* v. *Condon*, "after destroying the ship of party power and rule, threw out a spar upon which the party might keep its head above the tumultous political sea of 1932, that spar being the convention of the party, not acting on any State mandate, but on its unfettered volition." But this spar was discovered only after the Chief Justice had thus written (p. 129): "However much the logic and strength of the minority opinion in the case of *Nixon* v. *Condon*, herein cited, may excel those of the majority opinion, however much we may differ with the

majority opinion, representing only five of the nine judges of the Federal Supreme Court, still it is the law of the land, and this Court will endeavor to follow not only its spirit but its letter."

(*b*) The *Mason* case merely followed the *Booker* and *Bell* cases.

(*c*) In the *Bell* case, decided July 20, 1934, the Supreme Court of Texas gave its approval to the *Booker* case, but expressly disagreed with this Court's decision in *Nixon* v. *Condon, supra,* saying through Chief Justice Cureton (p. 121):

> "Justice Cardozo held that a proper construction of this statute was that the power to declare the membership of the party had been conferred upon the State Committee by law, and that the effect of this was to make the committee a state agency, which could not discriminate between the white and Negro races in fixing the membership of the Democratic Party. *With this construction of this Texas statute we cannot agree.* The State Executive Committee of the Democratic Party in Texas is just what its name implies—a committee clothed with executive power to carry out the will of the party." (Italics ours.)

The Supreme Court of Texas further held that, if this Court's construction of Article 3107 of the Revised Civil Statutes of Texas should prevail upon the proposition of whether the State Democratic Executive Committee was an agency of Government within the 14th or 15th Amendment (which this Court said in *Nixon* v. *Condon* it "will determine for itself"), then said statute would be "plainly void, because in violation of sections 27 and 2 of the Bill of Rights" (Article 1) of the Texas Constitution, which read as follows (R. 10):

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their

authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

"Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The Supreme Court of Texas further held (p. 119) that the power thus to discriminate against Negroes was guaranteed and protected by "the first section of the Bill of Rights, the First Amendment to the Constitution of the United States."

Petitioner challenges said Sections 2 and 27 of Article 1 (Bill of Rights of the Constitution of Texas, thus construed, and the decisions construing them, as violating petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10).

Petitioner's Injury.

Fourth. On July 28, 1934, a statutory Democratic primary election was held in the State of Texas, of the same character as the ones involved in *Nixon* v. *Herndon* and *Nixon* v. *Condon, supra,* at which nominations, equivalent to election, were made for United States Senator, United States Congressman, and state, district, county and precinct officers.

In obedience to the mandate of Article 2956 of the Revised Civil Statutes of Texas, absentee voting was being conducted on July 9, 1934, by the respondent, Albert Townsend, who was the duly elected, qualified, and acting county clerk of Harris County, Texas. Said article 2956 is quoted

in full in petitioner's original petition (R. 4), the pith of which reads:

> "Art. 2956. Absentee Voting. Any qualified elector, as defined by the laws of this State, who expects to be absent from the County of his or her residence on the day of election may vote subject to the following conditions, towit: At some time, not more than twenty (20) days nor less than three (3) days prior to the date of such election, such elector shall make his or her personal appearance before the Clerk of the County of his or her residence and shall deliver to such Clerk his or her poll tax receipt or exemption certificate entitling him or her to vote at such election, and said Clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election . . . The provisions of this article shall apply to all elections, including General, Special, and Primary elections.

The petitioner was on said July 9, 1934, a "qualified elector, as defined by the laws of" Texas; was a member of and believer in the tenets of the Democratic Party; expected to be absent from his county on said election day; made his personal appearance before the respondent and delivered to respondent petitioner's poll tax receipt entitling petitioner to vote in the election involved in this case; but respondent refused to deliver to petitioner a ballot or to permit petitioner to vote in said election, respondent giving as his sole reason and justification the fact that petitioner was a Negro, and that under the above quoted resolution of the State Democratic Convention of Texas and under instructions from the County Democratic Executive Committee of Harris County, Texas, petitioner was ineligible to vote in said election, solely and only because petitioner was a member of the Negro race.

Instant Suit Brought.

Fifth. Feeling himself aggrieved and damaged by his said disenfranchisement in the sum of Ten Dollars (ten times the damages awarded by the jury in *Nixon* v. *Herndon, supra;* ten times the amount agreed as the measure of damages by the parties in *Nixon* v. *Condon, supra;* and twice the amount of damages awarded upon a trial to the United States District Judge without a jury in *Nixon* v. *McCann,* No. 1660 Law, U. S. District Court, Western District of Texas, decided February 7, 1934, but not officially reported; twice the amount of damages awarded by the jury in *Bliley* v. *West,* 42 F. (2d) 101; (see certified copies of judgments in *Nixon* cases printed herewith as Appendices 1, 2, and 3), petitioner, on September 10, 1934, brought suit for ten dollars ($10.00) damages in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. Because of the amount involved, the Justice Court was the only Texas Court having jurisdiction; and no appeal lies from the judgment in such cases. Article 5, Section 19, Constitution of Texas; Articles 2385 and 2454, Revised Civil Statutes of Texas.

Petitioner filed a petition in said action in the Justice Court (R. 1) setting out the matters and things set forth above, and in addition thereto, the following pertinent facts:

1. That the petitioner, R. R. Grovey, is and was on July 9, 1934, a natural born citizen and resident of the United States and the State of Texas, was 44 years of age, a member of the Negro race, had resided in Harris County, Texas, for 18 years and in his voting precinct No. 85 for 4 years, next preceding the holding of the statutory Democratic primary election involved in this case, had paid his poll tax as required by law and held his official receipt there-

for, was a duly qualified elector under the laws of the United States and the State of Texas, was subject to none of the disqualifications for voting provided for under the constitution and laws of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

2. That Articles 3101 and 3102 of the Revised Civil Statutes of Texas (quoted in the petition, R. 2) required the holding of a statutory Democratic primary election on July 28, 1934; that said election was held pursuant to the mandatory requirements of said articles, and that petitioner had a legal right to vote therein, which right was protected by the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 3).

3. That Article 3107 of the Revised Civil Statutes of Texas (construed by this Court in *Nixon* v. *Condon, supra*) provides in part that "No person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That the immunities thus granted to the classifications of "former political views or affiliations" and "membership or non-membership in organizations other than the political party" have been held valid by the Supreme Court of Texas in *Love* v. *Wilcox*, 119 Texas 256, 28 S. W. (2d) 515; and that the failure of the Supreme Court of Texas to extend the same immunity to the classification of "race and color" in the *Bell* v. *Hill* case, *supra*, was a denial to petitioner and all other qualified Negro voters of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment and an abridgement of petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 9-10).

That the decision of the Supreme Court of Texas in the *Bell* v. *Hill* case was the culmination of a consistent course of statutory enactments and judicial decisions, since the original passage of the statutory primary election laws of Texas, under which the State of Texas has deprived the managers of said elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of Texas, except in the one instance where the managers of such elections have been authorized and permitted and protected by said "course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections." (R. 11.)

4. "That the Democratic Party is a national organization, and that the Democratic Party has not passed any rule or resolution or order excluding Negroes, and has not authorized any of its agencies or branches to pass any resolution, rule, or order excluding Negroes, or forbidding Negroes from becoming members of the Democratic Party, and that no State convention of the Democratic Party has the power by virtue of its being to pass any such rule, resolution, or order, and that the Democratic Party has never conferred power upon the State Democratic Convention of Texas to pass any such resolution, rule, or order." (R. 11.)

5. That the respondent, Albert Townsend, is a State officer of the State of Texas, who exercises only functions delegated to him by the laws of the State and whose compensation and salary are paid out of the tax money to which petitioner has contributed and is required to contribute by the laws of the State of Texas (R. 12).

6. That the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris

County, Texas, are agencies of government within the meaning of the Constitution of the United States and *Nixon* v. *Condon, supra* (R. 12).

Demurrer to Petition.

Sixth. The respondent, Albert Townsend, filed his demurrer to petitioner's petition as follows: "The defendant demurs generally to the plaintiff's petition and says it is insufficient in law and states no cause of action • • • (R. 13.)

Decision of Court.

Seventh. On September 24, 1934, the Justice Court entered its judgment sustaining the general demurrer and dismissing petitioner's petition, and entering judgment for respondent (R. 14).

Motion for New Trial.

Eighth. On September 25, 1934, petitioner filed his motion for a new trial in which he urged upon the Justice Court in detail that said judgment denied petitioner the due process of law and equal protection of laws guaranteed by the Fourteenth Amendment and abridged petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 15).

The motion for new trial was overruled on September 25, 1934. (R. 18.)

No Appeal Permitted.

Ninth. The amount involved being less than $20.00 no appeal or review is permitted (either as a matter of right or as a matter of discretion) to any higher State court of the State of Texas.

Texas Constitution, Article 5, Section 19.
Revised Civil Statutes of Texas, Article 2454.
Gulf etc. R. Co. v. *Rawlings*, 80 Texas 579, 16 S. W. 430.
Hudson v. *Smith* (Tex. Civ. App.), 133 S. W. 486.
Arrington v. *People's Supply Co.* (Tex. Civ. App.) 52 S. W. (2d) 678.

Grounds for Writ.

Tenth. Your petitioner respectfully submits that the judgment in the Justice Court sustaining the demurrer to his petition, dismissing his action, and giving judgment for the respondent, and the order overruling petitioner's motion for a new trial, were wholly erroneous for the reasons, among others; specifically stated in petitioner's motion for a new trial in the Justice Court, contained in the record (R. 15-18), and that this Honorable Court should grant the writ of certiorari prayed for herein in order to review and reverse the action of the court below.

Among the grounds which here exist for granting this writ, your petitioner respectfully invites attention to the following specified in Rule 38 (Former Rule 35), paragraph 5 (*a*) of the rules of this Court:

> "(*a*) Where a State court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The existence of the grounds for granting the writ prayed for will become apparent during the course of the argument in the supporting brief, annexed hereto and made a part hereof.

Wherefore, your petitioner prays this Honorable Court to issue a Writ of Certiorari directing the Justice Court,

Precinct No. 1, Position No. 2, Harris County, Texas, to certify the record in this case to this Court for review and determination.

Dated December 4, 1934.

R. R. GROVEY,
Petitioner.

J. ALTON ATKINS,
CARTER W. WESLEY,
Petitioner's Counsel.
Office and Post Office Address:
409 Smith Street, Houston, Texas.

A. S. WELLS,
F. S. K. WHITTAKER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND,

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Decision Below.

The decision below is not reported, but is printed in the Record at pages 14 and 18-19.

Jurisdictional Statement.

(a) *Statutory Provision Believed to Sustain Jurisdiction.*

First. In Texas, there are three courts of original jurisdiction: District Courts, County Courts, and Justice Courts; District Courts and County Courts also have certain appellate jurisdiction. The jurisdiction of these courts, respectively, is provided for in Article 5, Sections 8, 16, and 19 of the Texas Constitution; and Articles 1906-1911, 1949-

1960, and 2385-2387, 2454, 2460 of the Revised Civil Statutes of Texas. (These provisions are printed herewith as Appendices 4, 5, 6, and 7, respectively.)

Second. The Justice Court, because of the amount involved, was the only court having jurisdiction of the instant case under the constitution and laws of Texas. See Appendices 4, 5, 6, and 7.

Third. Because of the amount involved, no appeal was allowed from the judgment in the instant case to any other court, by the constitution and laws of Texas, either as of right or by permission of any court or judge, after application therefor. See Appendices 4, 5, 6, and 7; *Gulf, etc. R. Co.* v. *Rawlings*, 80 Texas 579, 16 S. W. 430; *Arrington* v. *People's Supply Co.*, (Tex. Civ. App.) 52 S. W. (2d) 678; 26 Texas Jurisprudence, Sec. 82, p. 879.

The law in Texas with regard to appeals from Justice Court is stated very clearly in *Hudson* v. *Smith*, (Tex. Civ. App.) 133 S. W. 486 (writ of error denied by Supreme Court of Texas, see note 133 S. W. 486), as follows (p. 488):

> "Neither the Constitution nor the law gives the right of appeal from judgments of the justices' courts when the amount in controversy is not more than $20, exclusive of costs. An appeal is not a matter of right, but the right is conferred by the Constitution or statute. In the absence of such grant, the right does not exist. A judgment from which there can be no appeal is conclusive between the parties, unless absolutely void. The amount in controversy in the case wherein the judgment is sought to be enjoined was less than $20, and therefore within the exclusive jurisdiction of the court which rendered it, from which no appeal could be taken."

The appellate jurisdiction of the Courts of Civil Appeals and the Supreme Court of Texas is found in Article 5,

Sections 3 and 6 of the Constitution of Texas, and Articles 1728 and 1819 of the Revised Civil Statutes of Texas. These provisions are printed herewith as Appendices 8 and 9 respectively.

Fourth. The record thus disclosing that "a final judgment or decree has been rendered or passed by the highest court" of Texas "in which a decision could be had" in the instant case, this Court has jurisdiction to review the decision below upon certiorari under Section 237 (*b*) of the Judicial Code, Section 344 (*b*) of the United States Code; because:

(1) There are drawn in question provisions of the Constitution of the State of Texas, which, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, to authorize the disenfranchisement of which petitioner complains, are alleged to violate petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10). These Texas constitutional provisions thus drawn in question are Sections 2 and 27 of Article 1 and they read as follows:

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The court below in the case at bar sustained the validity of these Texas constitutional provisions so construed.

(2) Petitioner set up and claimed below that respondent had deprived him of his civil right to vote in the statutory Democratic primary election involved in this case; that this civil right to vote was protected against infringement by the Fourteenth and Fifteenth Amendments to the Constitution of the United States; and that this civil right had been denied and abridged by respondent as an officer of the State of Texas, and by agencies of government within the meaning of *Nixon* v. *Condon*, 286 U. S. 73 (R. 3, 8, 12).

These Federal claims were denied by the court below.

(b) *Date of Judgment to be Reviewed.*

The judgment which petitioner prays this Court to review was entered on September 23, 1934 (R. 14); and petitioner's motion for a new trial was overruled on September 25, 1934 (R. 18-19). The petition for the writ of certiorari was filed December 6, 1934.

(c) *Statement of the Case.*

This case may be described as the sequel to *Nixon* v. *Condon*, 286 U. S. 73.

The petitioner, R. R. Grovey, a Negro citizen of the United States and of the County of Harris and State of Texas, brought this suit in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas, on September 10, 1934, against the respondent, Albert Townsend, to recover damages for wrongfully depriving petitioner of his legal right to cast an absentee vote in the statutory Democratic primary election involved in this case (R. 1).

Petitioner was a duly qualified elector under the Constitution and laws of the United States and of the State of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

The respondent, Albert Townsend, was on the 9th day of July, 1934, the duly elected, qualified, and acting county

clerk of Harris County, Texas, and as such was on said date conducting absentee voting for the election involved in this case, pursuant to the mandates of Article 2956 of the Revised Civil Statutes of Texas (R. 3-6).

The statutory Democratic primary election involved in this case and mentioned above was held on July 28, 1934, pursuant to the mandatory requirements of Articles 3101 and 3102 of the Revised Civil Statutes of Texas (R. 3).

On said July 9, 1934, petitioner, being a qualified elector, as defined by the laws of Texas, except that he was a Negro, presented himself in manner and form as required by said Article 2956 of the Revised Civil Statutes of Texas, fully complied with said Article 2956, and requested of respondent an absentee ballot; but respondent refused to give the ballot and deprived respondent of his right to cast an absentee vote in said election (R. 6-7).

The respondent gave as his sole and only reason for denying the ballot and the vote the fact that petitioner was a Negro, and that Negro voters, otherwise qualified, were disenfranchised in said election by virtue of instructions to that effect from the County Democratic Executive Committee of Harris County, Texas, and by virtue of a resolution adopted May 24, 1932, by the State Democratic Convention of Texas—meeting pursuant to Article 3167 of the Revised Civil Statutes of Texas—which resolution reads as follows (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic Party and as such, entitled to participate in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113, 114, and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326, for variations in wording of resolution.

Petitioner in his original petition below challenged in detail the authority set up by respondent for his acts in depriving petitioner of his right to cast the absentee vote as being a violation of petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment and as abridging petitioner's right to vote under the Fifteenth Amendment to the Constitution of the United States (R. 8-11). The contentions of petitioner in this regard will appear more fully below in this brief.

Petitioner alleged that the Democratic Party is a national political party, which does not exclude Negroes from membership in it; and that the Democratic Party has never authorized any of its branches or agencies, more particularly the State Democratic Convention of Texas, to exclude Negroes from membership in the Democratic Party (R. 11).

Petitioner alleged that nominations, equivalent to election, were made in the statutory Democratic primary election involved in this case, not only for State and county officers, but also for United States Senator and Congressman (R. 11).

Petitioner alleged that the respondent, Albert Townsend, was a State officer, functioning only under State laws, whose salary was paid out of public funds; and that the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, are agencies of government within the meaning of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and *Nixon* v. *Condon*, 286 U. S. 73 (R. 12).

Respondent filed a general demurrer to petitioner's petition (R. 13).

The court below sustained the general demurrer and dismissed petitioner's action (R. 14).

In due course, petitioner filed a motion for a new trial, in which he again raised the Federal questions set up in

his original petition, and also challenged the judgment itself as depriving petitioner of his rights under the Fourteenth and Fifteenth Amendments. (R. 15-18). All of these Federal questions are presented more fully below in this brief.

The court below overruled the motion of petitioner for a new trial (R. 18-19).

(d) *Cases Believed to Sustain Jurisdiction.*

Certiorari was granted in *Nixon* v. *Condon*, 286 U. S. 73, to the Circuit Court of Appeals for the Fifth Circuit to review identical Federal questions involved in this case. The identical Federal claim sustained by this Court upon the merits in *Nixon* v. *Condon, supra,* was denied by the court below in the case at bar (R. 14, 18).

The authorities are unanimous that this Court has jurisdiction to review a final judgment of an inferior State court, where no appeal of any kind lies from that inferior court's judgment.

The general proposition is stated in the opinion of this Court in *Kentucky* v. *Powers*, 201 U. S. 1, 37, as follows:

> "But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can ex-

> ercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege, or immunity asserted. This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed."

In the case of *The Moses Taylor* v. *Hammons*, 18 L. Ed. 397, suit was, as in the instant case, brought in a justice court. Under the California law, the State in which the suit was brought, an appeal lay to the county court, whose judgment, on account of the amount involved, was non-appealable. This Court reviewed and reversed the judgment of the county court, saying upon the jurisdictional question (p. 400):

> "The decision of the county court was the decision of the highest court in the State which had jurisdiction of the controversy. From that court, therefore, the case is brought here by writ of error."

Other cases upholding the same principle are:

Downham v. *Alexandria*, 19 L. Ed. 807.
Missouri, etc. v. *Elliott*, 184 U. S. 530.
Western Union v. *Hughes*, 203 U. S. 505.

Section 3214 of Hughes' Federal Practice states the broad principle as follows:

> "It makes no difference how minor or unimportant the state court may be if its decision is final and there is no higher court having jurisdiction."

Summary of Grounds Upon Which Writ Is Sought.

Petitioner prays for a writ of certiorari for the following reasons (Paragraph 5a of Rule 38, former Rule 35, of this Court) discussed below in this brief:

(1) The State court below has decided a Federal question of substance not theretofore decided by this Court—a Federal question expressly left open by this Court, in *Nixon* v. *Condon*, 286 U. S. 73, "until decision becomes necessary."

(2) The State court below has decided Federal questions of substance in a way probably not in accord with the following applicable decisions of this Court:

Nixon v. *Herndon*, 273 U. S. 536.
Nixon v. *Condon*, 286 U. S. 73.
Travis v. *Yale & Towne Mfg. Co.*, 252 U. S. 60.
Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.
United States v. *Reese*, 92 U. S. 214.

(3) Because of their importance to the public the questions involved in this case should be settled by this Court. Nearly a million Negroes are now disenfranchised in Texas, and about ten millions in the South, chiefly, as a matter of common and general knowledge, through the instrumentality of statutory Democratic primary elections, equivalent to general elections, like the one involved in this case; and such disenfranchisement is the real purpose of these statutory primary creations. Deciding expressly to the contrary, the Federal question ruled upon by this Court in *Nixon* v. *Condon*, *supra*, the Supreme Court of Texas has held in *Bell* v. *Hill*, 74 S. W. (2d) 113, that this disenfranchisement of the nearly million Negroes of Texas is not only legal, but that it is guaranteed and protected both by the Constitution of Texas and the Constitution of the United States. Two Texas Courts of Civil Appeals

have also recently held that this disenfranchisement must stand, in spite of *Nixon* v. *Condon, supra.* The court below in the instant case has followed the Texas appellate courts, and its jurisdiction was exclusive and its judgment final and non-appealable.

If this Court declines to exercise its discretion to take the jurisdiction in this case which by all the authorities it has, not only the State of Texas, but the entire South will obviously consider itself entrenched in the position which the Texas courts have already expressed—that the disenfranchisement of ten million Negroes as now practiced is in full accord with the decisions of this Court. Color should not be lent to that position without a full hearing upon the merits in this Court.

ARGUMENT.

Point Number One.

The State court below has decided a Federal question of substance not theretofore decided by this Court—a Federal question expressly left open by this Court in *Nixon* v. *Condon,* 286 U. S. 73, "until decision becomes necessary."

(1) The Federal question referred to in this point was stated and expressly left open by this Court in *Nixon* v. *Condon, supra,* in the following words (p. 83):

> "Whether a political party in Texas has inherent power today without restraint by any law to determine its own membership, we are not required at this time either to affirm or to deny. The argument for the petitioner is that, quite apart from the article in controversy, there are other provisions of the Election Law whereby the privilege of unfettered choice has been withdrawn or abridged (citing, e. g. Articles 2955, 2975, 3100, 3104, 3105, 3110, 3121, Revised Civil Laws); that nomination at a primary is in many circumstances

required by the statute if nomination is to be made at all (Article 3101); that parties and their representatives have become the custodians of official power (Article 3105); and that, if heed is to be given to the realities of political life, they are now agencies of the State, the instruments by which government becomes a living thing. In that view, so runs the argument, a party is still free to define for itself the political tenets of its members, but to those who profess its tenets, there may be no denial of its privileges.

"A narrower base will serve for our judgment in the cause at hand. Whether the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association, we do not now decide. Nothing in this opinion is to be taken as carrying with it an intimation that the court is ready or unready to follow the petitioner so far. *As to that, decision must be postponed until decision becomes necessary.*" (Italics ours.)

Petitioner made the following allegation in his original petition below (R. 11):

"Plaintiff further alleges that by a consistent course of statutory enactment and judicial decisions, since the original passage of the statutory primary election laws of Texas in 1903, the State of Texas has deprived the managers of such elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of the State of Texas, except in the one instance where the party managers have been authorized and permitted and protected by said course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections."

The judgment below sustaining the general demurrer and dismissing petitioner's action decided this Federal question of substance which this Court "postponed until decision becomes necessary," in *Nixon* v. *Condon, supra,* and decided it contrary to the contention of petitioner.

Decision of that Federal question by this Court has now become necessary, and this Court should grant a review of the judgment below for that purpose..

(2) That "the effect of Texas legislation has been to work so complete a transformation of the concept of a political party as a voluntary association," so far as the primary election laws of Texas are concerned, seems to petitioner to be now beyond question.

The Supreme Court of Texas itself refers to such an election as a "statutory primary election." See *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760.

The present nature of the statutory Democratic primary election in Texas is, of course, not an unmixed question of law. It is a question of history, fact, and law. Whether such an election is now an agency of government within the Fourteenth and Fifteenth Amendments, this Court has held, in *Nixon* v. *Condon*, *supra*, that it "will determine for itself."

In determining the historical and factual aspects of such Federal question, petitioner believes that the findings of the United States District Judge, who presides over the Federal Judicial District in which the case at bar arose, are entitled to great weight. In the case of *White* v. *The County Democratic Executive Committee*, 60 F. (2d) 973, United States District Judge Kennerly, discussing the identical resolution involved in the case at bar, gave the following significant historical summary (p. 974):

> "Respondents, however, insist that the Democratic Party's power with respect to and its convention's powers to pass, such resolution, are inherent, possessed long prior to the enactment of article 3107, and in no manner derived from the State of Texas. That this was true prior to the enactment of laws in Texas regulating the political parties, etc., there is little, if any, doubt. That it is not true now is certain. For a

period of more than twenty-five years, the Democratic Party in Texas has, from time to time, accepted grants of power from the State, surrendered its own inherent powers, and caused to be passed laws abridging its inherent powers, until, as was said in *Briscoe* v. *Boyle* (Tex. Civ. App.) 286 S. W. 275, 276, the party has little or no discretion in the management of its party affairs. Unlike Moses, who refused to be known as the son of Pharoah's daughter, the Democratic Party in Texas has, over a period of twenty-five years, chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the State.

"It is only necessary to review the history of legislation in Texas, respecting political parties, Acts of 28th Legislature (1903), c. 101, § § 82 to 107, p. 148, 12 Gammel's Laws of Texas; Acts of 29th Legislature (1905), 1st Called Sess., c. 11; § § 102 to 195, p. 543, 12 Gammel's Laws of Texas; Texas Revised Civil Statutes 1911, articles 3084 to 3175 and amendments; Texas Revised Civil Statutes 1925, articles 3100 to 3173 and amendments (Vernon's Annotated Revised Civil Statutes of Texas, articles 3100 to 3173), and to review the decisions of the higher courts of Texas, construing such legislation, *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515, 523; *Briscoe* v. *Boyle* (Tex. Civ. App.) 286 S. W. 275; *Koy* v. *Schneider*, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880; *Westerman* v. *Mims*, 111 Tex. 29, 227 S. W. 178; *Walker* v. *Hopping*, (Tex. Civ. App.) 226 S. W. 146; *Dewees* v. *Stevens*, 105 Tex. 356, 150 S. W. 589; *Mays* v. *Cobb*, 100 Tex. 131, 96 S. W. 1079; *Gilmore* v. *Waples*, 108 Tex. 167, 188 S. W. 1037; *Ashford* v. *Goodwin*, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913 A, 699; *Morris* v. *Mims*, (Tex. Civ. App.) 224 S. W. 587; *Waples* v. *Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917 A, 253; *Hamilton* v. *Munroe*, 116 Tex. 153, 287 S. W. 306; *Nicholson* v. *Scurry*, 119 Tex. 250, 28 S. W. (2d) 512; *Holzschuber* v. *Wurzbach* (Tex. Civ. App.), 286 S. W. 289; *Love* v. *Buckner* (Tex.

> Sup.), 49 S. W. (2d) 425, to show this to be true. Add to this the provisions of the present laws, regulating in detail the affairs of political parties, and it becomes unanswerable that the convention passing this resolution was an agency of the state, in the same manner and to the same extent as the state Democratic executive committee. *Nixon* v. *Condon, supra.* The convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925."

It is proper for this Court to take judicial notice of the facts of political history set forth in the excerpt from Judge Kennerly's opinion, *supra*. *Underhill* v. *Hernandez*, 168 U. S. 250.

It is not possible within the limits of a brief upon petition for a writ of certiorari to review all of the cases in the Texas appellate courts to prove that Judge Kennerly's historical and factual analysis is true. If this case is heard upon the merits, petitioner believes that he will be able, by an analysis of all of the pertinent Texas cases, to show, not only that Judge Kennerly's historical and factual summary is correct, but that in every instance the Texas appellate courts have denied to the managers of the statutory Democratic primary elections of Texas power to fix qualifications and tests for participation therein inconsistent with the qualifications and tests fixed by the constitution and laws of Texas, except in the one instance where the managers of the statutory Democratic primary elections have been "guaranteed" the power to exclude Negroes from such participation.

This contention was set up by petitioner in the court below and was denied (R. 11, 17).

An indication that such a transformation has occurred in Texas, so far as the statutory Democratic primary elec-

tions are concerned, can be demonstrated by reference to three pairs of cases in three different Texas appellate courts.

(1) In *Love* v. *Wilcox*, 28 S. W. (2d) 515, the Supreme Court of Texas held that past party affiliations (the historical test of party loyalty) and membership or non-membership in organizations other than the political party cannot be made qualifications or tests for participation in the statutory Democratic primary election. In *Bell* v. *Hill*, 74 S. W. (2d) 113, the Supreme Court of Texas held that the power to make race and color such a qualification and test is "guaranteed" by the Bill of Rights of Texas.

(2) In *Briscoe* v. *Boyle*, 286 S. W. 275 (cited with approval in *Love* v. *Wilcox*, *supra*, and in *County Democratic Executive Committee* v. *Booker*, *infra*), the Court of Civil Appeals at San Antonio held that "In this State the qualifications of persons entitled to vote in general elections are fixed by the Constitution, and, except those excluded by express restrictive provisions in the statutes (only Negroes were at that time excluded by such express provisions in the statutes), all persons qualified to vote in general elections are entitled to participate in party primary elections." In *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123, the Court of Civil Appeals at San Antonio held that the exclusion of Negroes from participation in the statutory Democratic primary elections is "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*."

(3) In *Clancy* v. *Clough*, 30 S. W. (2d) 569, the Court of Civil Appeals at Galveston (the Texas Judicial District in which the case at bar arose) affirmed a judgment of the trial court enjoining the defendant "from placing upon the official ballot any pledge other than that prescribed by the

statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." In *White* v. *Lubbock*, 30 S. W. (2d) 722, the Court of Civil Appeals at Galveston, with more consistency, held that the resolution stricken down by this Court in *Nixon* v. *Condon, supra*, was "a valid exercise" of the "party's inherent power."

POINT NUMBER TWO.

The state court below has decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

I. The decision below is not in accord with the applicable decision of *Nixon* v. *Herndon*, 273 U. S. 536.

Nixon v. *Herndon* decided two propositions:

(1) That a qualified Negro citizen has the same civil right to vote in the statutory Democratic primary elections of Texas as he does in a general election of that State.

Mr. Justice Holmes, rendering the opinion of this Court, said that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result" (p. 540).

The reason that allows a recovery for denying a vote at a final or general election is not that the defendant, who may deny the vote, is a state officer, but that plaintiff has a legal civil right to vote in the election and the defendant has a legal duty not to deny that right. Substantial allegations of action by the state may be necessary to give the Federal courts jurisdiction to redress the wrong, but the presence or absence of the state in the picture does not determine the presence or absence of either the right of plaintiff or the duty of the defendant. As said by this Court in the *Civil Rights Cases*, 109 U. S. 3, 17:

> "An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

The Circuit Court of Appeals for the Fifth Circuit has expressed the same view of *Nixon* v. *Herndon* on this first proposition, as that entertained by petitioner.

> "It is of course to be conceded, since the decision in *Nixon* v. *Herndon, supra,* that the right of a qualified citizen to vote extends to primary elections as well as to general elections." *Nixon* v. *Condon,* 49 F. (2d) 1012, 1013.

(2) The second proposition held by *Nixon* v. *Herndon, supra,* was that the Fourteenth Amendment prohibits the state from lending its protection to the deprivation of that civil right to vote in the statutory Democratic primary elections of Texas, and a Texas statute seeking to do this was stricken down as being unconstitutional.

Both of the propositions of *Nixon* v. *Herndon* are present in the instant case. That the civil right to vote in the statutory Democratic primary election involved in this case has been denied will not and cannot be questioned. Petitioner so alleged (R. 7) and respondent's general demurrer so admits (R. 13).

That the state of Texas has participated in and given its protection to the deprivation of petitioner's civil right to

vote in the statutory Democratic primary election involved in this case is likewise clear.

(a) It cannot be disputed that the respondent, who denied the vote, was a state officer. His office of county clerk is created by the Texas constitution (Art. 5, sec. 20). His powers and duties are fixed by statute. Chapter Two, Title 41, Articles 1935-1948, Revised Civil Statutes of Texas. His compensation is fixed by statute and comes out of public funds: Articles 3883, 3932, and 1644 of the Revised Civil Statutes of Texas. His powers and duties as the sole conductor of absentee voting in Harris County, Texas, are wholly fixed by statute. Article 2956 of the Revised Civil Statutes of Texas. Indeed, absentee voting was unknown in Texas prior to its creation by statute. See *Sterling* v. *Ferguson* (Tex. Sup.), 53 S. W. (2d) 753, 760.

(b) The judgment of the court below denying to petitioner, on account of his race and color alone, redress for the deprivation of his civil right to vote in the statutory Democratic primary election involved in this case is just as much a protection of the deprivation by the State of Texas as was the statute stricken down by this Court in *Nixon* v. *Herndon, supra.*

That State judicial decisions are as much within the prohibition of the Fourteenth and Fifteenth Amendments as legislative enactments has been well settled by this Court. *Brinkerhoff-Faris Trust and Savings Company* v. *Hill,* 281 U. S. 673, 680 (and cases cited).

(c) The State of Texas has further given its protection to the deprivation of petitioner's civil right to vote by the decision of the Supreme Court of Texas in *Bell* v. *Hill,* 74 S. W. (2d) 113, which holds that the deprivation is protected and guaranteed by the First Amendment to the Constitution of the United States and Sections 2 and 27 of Article 1 of the Constitution of Texas (pp. 119, 122).

II. The decision below is not in accord with the applicable decision of *Nixon* v. *Condon*, 286 U. S. 73.

Nixon v. *Condon* decided three propositions, two Federal questions of law and one question of fact inhering in and necessary to a decision of the Federal questions of law. These three propositions appear from the following three quotations from *Nixon* v. *Condon, supra:*

(1) "Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, *not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.*" (P. 84, Italics ours.)

(2) "The pith of the matter is simply this, that, *when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.* They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere." (P. 88, Italics ours.)

(3) "*Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere.* The test is not whether the members of the executive committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to

such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (P. 88, Italics ours.)

Nixon v. *Condon, supra,* went off on the question of fact that, assuming a question of party membership to be involved, no authorized voice of the Democratic Party had yet spoken that Negroes could not be Democrats. Specifically, this Court held as a matter of fact, determined by "the fundamental postulates of party organization," that the Texas State Democratic Executive Committee was not such an authorized voice.

Petitioner contends that there is not properly involved in this case any question of party membership, but that, if there is, the instant case is on all-fours with *Nixon* v. *Condon, supra,* in that still no authorized voice of the Democratic Party has yet said that Negroes could not be Democrats; but that on the contrary, the supreme voice of the Democratic Party has, since the Texas State Democratic Convention passed the resolution involved in this case, dedicated that party to the Jeffersonian principle of "equal rights to all, special privileges to none."

(*a*) The Democratic Party is a *national political party;* it is not a *State political party.*

A few quotations from Bryce's The American Commonwealth will show beyond question this historical truth.

> "What constitutes a party? In America, there is a simple test. Any section of men who nominate candidates of their own for the presidency and vice-presidency of the United States are deemed a national party. Adopting this test, we shall find that there have lately been two or three *national parties in addition to the Republicans and Democrats.*" (Bryce, The American Commonwealth, Vol. 2, p. 41.) (Italics ours.)
>
> "We might therefore expect that the State parties would be as distinct from the national parties as are the State governments from the Federal.

"The contrary has happened. The national parties have engulfed the State parties. The latter have disappeared absolutely as independent bodies, and survive merely as branches of the national parties, working each in its own State for the tenets and purposes which a national party professes and seeks to attain." (Vol. 1, p. 572.)

"Accordingly, the national parties have complete possession of the field. In every State from Maine to Texas, all State elections for the governorship and other offices are fought on their lines; all State legislatures are divided into members belonging to one or other of them. Every trial of strength in a State election is assumed to presage a similar result in a national election. Every State office is deemed as fitting a reward for services to the national party as for services in State contests. *In fact, the whole machinery is worked exactly as if the State were merely a subdivision of the Union for electoral purposes.*" (P. 574, Italics ours.)

(*b*) The Democratic Party being a national political party, its supreme voice is the National Democratic Convention.

In *Nixon* v. *Condon, supra,* this Court said the following (p. 84):

"Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. (Bryce, Modern Democracies, Vol. 2, p. 40.)" (Italics ours.)

On page 46 of the same authority (Bryce, Modern Democracies, Vol. 2), writing to the same point with reference to *national political parties,* Viscount Bryce says:

"In the United States the National Convention is the supreme exponent of party doctrine and policy, universally recognized as the party oracle."

Whatever inherent power the Democratic Party has, therefore, to determine the content of its membership resides, not in forty-eight separate and distinct and different State Democratic conventions, not even in the State Democratic Convention of Texas, as would be true if it were a State political party—but that inherent power, such as exists in America today, resides in the National Democratic Convention.

Any power which the State Democratic Convention of Texas may claim to determine the content of the membership of the Democratic Party must, therefore, necessarily come to it as a matter of delegation from the National Democratic Convention.

Petitioner alleged in his petition below that no power to exclude Negroes had been thus delegated (R. 11). The general demurrer (R. 13), of course, concedes this fact.

Not only has the National Democratic Convention not delegated any such power, but it closed its platform adopted at Chicago on June 27, 1932, (subsequent to May 24, 1932, the date of the resolution of the Texas State Democratic Convention confining membership in the Democratic Party to white people) with these words:

> "To accomplish these purposes and to recover economic liberty we pledge the nominees of this convention and the best effort of a great party whose founder announced the doctrine *which guides us now*, in the hour of our country's need '*equal rights to all, special privileges to none.*'" (World Almanac, 1933, p. 933.) (Italics ours.)

It is a matter of historical and general knowledge, too, that Negroes were seated in the National Democratic Convention of 1932.

It is also significant that the Texas State Democratic Convention which sought by the resolution involved in this case to confine membership in the Democratic Party to the

white race, was meeting pursuant to a Texas statute, Article 3167 of the Revised Civil Statutes of Texas, for the express and only purpose of electing delegates to this same National Democratic Convention of 1932. The Supreme Court of Texas states, in *Bell* v. *Hill, supra,* at p. 114, that such was the nature and purpose of the State Democratic Convention, which adopted the resolution involved in this case:

> "The petition states in substance, in part, that the respondents are denying or will deny, the relators the right to vote, because of a resolution passed by the State Convention of the Democratic Party in Texas on May 24, 1932, which reads: 'Be it resolved, that all white citizens of the State who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party, and as such eligible for participation in the primaries.'
>
> "This resolution was passed by the Democratic Convention which met at Houston for the purpose of electing delegates to the National Convention of the Democratic Party."

(*c*) The Texas State Democratic Convention had no inherent power by virtue of its being to say who may be Democrats and who may not.

"The National Convention is the supreme exponent of party doctrine and policy." Bryce, Modern Democracies, *supra.* As explained in Bryce's The American Commonwealth, *supra,* the State convention in Texas is merely a branch or subdivision of the national party, and as such is vested only with the management of the party's affairs in a single State. Except when duly authorized by the supreme voice of the Democratic Party, which it was not in this case, it has no power to exercise the supreme inherent power of the Democratic Party. The reasons were plainly stated by this Court in *Nixon v. Condon, supra* (p. 86), as follows:

> "The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence."

Founded by Thomas Jefferson long prior even to the independence of Texas from Mexico, to say nothing of its statehood, the members of the Democratic party were already associated together as a party for several decades prior to the creation of the State Democratic Convention of Texas. It follows then that this State convention could not, *ipso facto,* and by its own *ipse dixit,* and merely by receiving the privilege of itself becoming a branch of the Democratic Party, suddenly ascend into possession by virtue of its being of all of the inherent powers of the party, with full authority to rule out even those who let the Texas State Democratic Convention into the Democratic Party.

(*d*) The Texas State Democratic Convention having neither delegated nor inherent power to make race and color a test for membership in the Democratic Party, it is inescapable that whatever power it has in this regard has come to it by virtue of Sections 2 and 27 of the Bill of Rights (Article 1) of the Texas Constitution, as construed by the Supreme Court of Texas in *Bell* v. *Hill,* 74 S. W. (2d) 113.

In *Nixon* v. *Condon, supra,* this Court held that the State Democratic Executive Committee was an agency of the State in depriving Negroes of their vote because that committee had "excluded petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law."

The same is true of the Texas State Democratic Convention in the case at bar, and that convention is likewise, for the same reason, an agency of the State. Speaking of the convention's power, the Supreme Court of Texas said at page 122 of *Bell* v. *Hill, supra:*

> "We are clearly of the opinion that the resolution passed by the Democratic State Convention at Houston was a valid resolution under the power clearly guaranteed to that body by the Bill of Rights of this State." (Italics ours.)

In *Nixon* v. *Condon, supra,* this Court said of the same power claimed by the State Democratic Executive Committee, the following (p. 85):

> "If the State had not conferred it, there would be hardly color of right to give a basis for its exercise."

Likewise, when the State Democratic Convention of Texas arrogates unto itself this same power without authority from the supreme voice of the Democratic Party, petitioner respectfully submits that "if the State had not" *guaranteed* "it, there would be hardly color of right to give a basis for its exercise."

(*c*) This Court is not bound by decisions of the Supreme Court and Court of Civil Appeals of Texas holding that the Texas State Democratic Convention is not an agency of government.

In *Nixon* v. *Condon, supra,* this Court said the following (p. 88):

> "Whether in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. *It is not concluded upon such an inquiry by decisions rendered elsewhere.*" (Italics ours.)

Not only is this ultimate Federal question open for review by this Court, but this Court may also decide for itself every other question which inheres in or is necessary to a proper decision of that Federal question. Such an incidental question is the question of whether the Texas State Democratic Convention, as a branch of the Democratic Party, has the inherent power by virtue of its being to make race and color a test of being a Democrat, in the very teeth of a subsequent declaration of the National Democratic Convention—which Viscount Bryce says is "the supreme exponent of party doctrine and policy"—dedicating the Democratic Party to a policy of "equal rights to all, special privileges to none."

The general principle of this Court's power and duty to decide for itself such questions has been recently restated by this Court through Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 397, as follows:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority ap-

propriate to its exercise. *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a State Court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right.*" (Italics ours.)

In the more recent case of *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158, 159, this Court said:

> "The Supreme Court of the State reached the conclusion that all the cars had their 'taxable situs' at the latter place. As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Besides, the question involved is a question of general law and jurisprudence, and as to such questions this court has always reserved the right to exercise its own independent judgment.

Swift v. *Tyson*, 10 L. Ed. 865.
Burgess v. *Seligman*, 107 U. S. 20.
Sim v. *Edenborn*, 242 U. S. 131.
See also: *Barclay* v. *Hayes*, 208 Fed. 319.

III. Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Stat-

utes of Texas as upheld by the Supreme Court of Texas in the case of *Love* v. *Wilcox*, 28 S. W. (2d) 515. The denial by the judgment of the court below of this claim of Federal right is not in accord with such decisions of this Court as *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, holding that where one class is favored by exemptions denied to another class under the state law, there must be some reasonable basis for the classification thus established in order for it to meet the requirements of the equal protection clause of the Fourteenth Amendment.

That race and color cannot be made the basis of such a classification has been well settled by this Court:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." (P. 541 of *Nixon* v. *Herndon, supra*).

It should be kept in mind also under this point that we are not dealing with a convention formed at the instance or suggestion of private individuals upon their own volition. But, on the contrary, as said by United States District Judge Kennerly in *White* v. *The County Democratic Executive Committee, supra*, "the convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting, and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925." Moreover, as said by the Supreme Court of Texas in *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760, the election involved is a "statutory primary election."

And it is in such a *statutory* election and to such a *statutory creature* that sections 2 and 27 of the Texas Bill of Rights guarantees the power to make race and color a

qualification and test of voting, while Article 3107 of the Revised Civil Statutes of Texas (held valid by the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515) exempts from such discrimination the classifications of past party affiliations (the traditional test of party loyalty) and membership or non-membership in organizations other than the political party.

So, whatever may be the rights and privileges of men whose own minds and volitions bring them together, at a time, and in a manner, and for purposes which they themselves privately decide upon, it is obvious that the public wellfare demands a different standard of duty from men who meet together "by virtue of" and "under the terms of" a State statute (see *Bell* v. *Hill, supra*, pp. 114, 121), especially when, as such a "creation of a statute" they possess "power clearly guaranteed" (see *Bell* v. *Hill, supra*, p. 122) by the State law to make race and color a test of voting in a "statutory" election.

IV. The decision below is not in accord with the applicable decision of *United States* v. *Reese*, 92 U. S. 214, where construing the Fifteenth Amendment, this Court said (p. 218):

> "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be."

In every instance where the managers of Statutory Democratic primary elections have sought to deny participation therein to white people upon grounds inconsistent with the qualifications and tests laid down in the constitution and laws of Texas, the Texas appellate courts have prevented the denial. For examples see the following cases:

Love v. *Wilcox*, 28 S. W. (2d) 515.

Briscoe v. *Boyle*, 286 S. W. 275.

Clancy v. *Clough*, 30 S. W. (2d) 569.

On the other hand, in every case where the managers of statutory Democratic primary elections have denied Negroes on account of race and color alone, the right to vote therein, the Texas appellate courts have upheld the deprivation. For examples, besides the case at bar, see the following cases:

Bell v. *Hill*, 74 S. W. (2d) 113.
White v. *Lubbock*, 30 S. W. (2d) 722.
County Democratic Executive Committee v. *Booker*, 53 S. W. (2d) 123.

Conclusion.

Because (*a*) the case comes to this Court from the highest court of Texas "in which a decision could be had", and (*b*) because the judgment of the State court below decided a Federal question of substance not theretofore decided by this Court—a Federal question which this Court expressly left open in *Nixon* v. *Condon* "until decision becomes necessary," and (*c*) because the judgment of the State court below is not in accord with the applicable decisions of this Court set forth and discussed above in this brief, and (*d*) because the questions involved in this case are of great public interest, affecting, as they do, the franchise rights of approximately one-sixth of the population of Texas and approximately one-third of the population of the South, petitioner prays that this Court may exercise its discretion favorably by granting the writ of certiorari applied for in this case.

Respectfully submitted,

J. Alton Atkins,
Carter W. Wesley,
Counsel for Petitioner.

A. S. Wells,
F. S. K. Whittaker,
Of Counsel.

APPENDIX 1.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

No. 994. Law.

L. A. NIXON, Plaintiff

vs.

C. C. HERNDON AND CHARLES PORRAS, Defendants

Now, on this 1st day of February, A. D. 1928, at a regular term of this court came on regularly to be heard the above styled and numbered cause. The plaintiff, L. A. Nixon, appeared in person and by counsel and announced ready for trial, and the defendants, C. C. Herndon and Chas. Porras, having been duly and legally served with notice, appeared not, but wholly made default. Whereupon came the jury, composed of Jake Kaufman and eleven other good and lawful men, who were impanelled and sworn to try the issues in said cause, and after having heard the pleadings read, and the evidence submitted by the plaintiff, and the argument of counsel, the court instructed the jury to find the issues in favor of the plaintiff, and the jury returned the following verdict: "We, the jury under instructions of the court, find for the plaintiff L. A. Nixon, against the defendants, C. C. Herndon and Chas. Porras, in the sum of one dollar. Jake Kaufman, Foreman."

And in accordance therewith the Court doth find: That the law and the evidence is with the plaintiff; that the plaintiff was denied the right to vote at the Primary Election on July 26, 1924, for candidates for office upon the Democratic ticket, by the defendants, and that said refusal was a denial to the plaintiff of his rights, and that plaintiff is damaged, and the Court finds his measure of damages to be $1.00.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, L. A. Nixon, have and recover of and from the defendants, C. C. Herndon and Charles Porras, the sum of $1.00, and costs of suit. For which let execution issue.

(Signed) Charles A. Boynton, Judge.

Endorsed: No. 994. In the District Court of the United States Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants. Judgment. Filed Feb. 1, 1928 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 20, page 108.

UNITED STATES OF AMERICA
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing on 1½ pages, is a true and correct copy of the Judgment in cause No. 994-Law, styled L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 2.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

No. 1379. Law.

L. A. NIXON, Plaintiff,

vs.

JAMES CONDON and C. H. KOLLE, Defendants.

This cause coming on to be heard on this the 15th day of October, A. D. 1932, in open court, the plaintiff being present in person and by his attorneys, Fred C. Knollenberg and E. F. Cameron, and the defendants being present by their attorney, Ben R. Howell, and a jury being waived, all matters of fact as well as of law was submitted to the court; and the court having heard the pleadings read, and being fully advised in the premises doth find that the law and the facts are with the plaintiff who is entitled to recover a judgment against the defendants for having been deprived of his right to vote in the Democratic Primaries, thereupon the attorneys announced in court that they had agreed that a judgment might be rendered for the amount of One Dollar ($1.00).

It is, therefore, ordered, adjudged and decreed that plaintiff, L. A. Nixon, have and recover of and from James Condon and C. H. Kolle the sum of One Dollar ($1.00) and all costs in this cause incurred.

(Signed) Charles A. Boynton, Judge. Form O. K. Howell.

Endorsed: No. 1379—Law. In the District Court of the United States for the Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants. Judgment. Filed October 15, 1932. D. H. Hart, Clerk, by (signed) J. F. Caroline, Deputy. Volume 27, page 391.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1379—Law, styled L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 3.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

October Term, A. D. 1933.

No. 1660. Law.

L. A. NIXON, Plaintiff,

v.

GEORGE L. McCANN and FRANK BRENK, Defendants.

This cause coming on to be heard on this the 7th day of February, A. D. 1934, and all parties having heretofore filed a written stipulation waiving a jury and agreeing to submit all matters of fact, as well as of law, to the court, and in open court announced ready for trial;

And the court having heard the pleadings read and the evidence submitted and the arguments in support thereof, is of the opinion that the law and the evidence is with the plaintiff and he ought to have and recover of and from

the defendants his damages against the defendants in the sum of Five Dollars.

It is, therefore, ordered, adjudged, and decreed, that plaintiff have and recover of and from the defendants judgment in the sum of Five Dollars, together with all costs of this proceeding, for which let plaintiff have his execution.

Done, at El Paso, Texas, at this the October Term, A. D. 1933.

(Signed) Charles A. Boynton, Judge. Approved: Ben R. Howell, R. L. Holliday, Atty's. for Def't.

Endorsed: No. 1660—Law. L. A. Nixon vs. George L. McCann and Frank Brenk. Judgment. Filed for record February 7, 1934 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 29, page 569.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1660—Law, styled L. A. Nixon, plaintiff, vs. George L. McCann and Frank Brenk, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

APPENDIX 4.

Sections 8, 16, and 19 of Article 5, Constitution of Texas:

"SEC. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures

and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

"The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. (Sec. 8, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"Sec. 16. The County Court shall have original jurisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and they shall have exclusive jurisdiction in all civil cases when the matter in

controversy shall exceed in value $200, and not exceed $500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500, and not exceed $1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed $20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial *de novo* in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent or original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

"The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, idiots, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunctions, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the County Court, or any other court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie

from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law. (Sec. 16, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"SEC. 19. Justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be *ex officio* notaries public. And they shall hold their courts at such times and places as may be provided by law."

APPENDIX 5.

Articles 1906-1911, Revised Civil Statutes of Texas.

Article 1906. (1705) (1098) (1117) Original jurisdiction.

"The district court shall have original jurisdiction in civil cases of:

"1. Suits in behalf of the State to recover penalties, forfeitures and escheats.

"2. Cases of divorce and dissolution of marriage.

"3. Suits to recover damages for slander or defamation of character.

"4. Suits for the trial of title to land and for the enforcement of liens thereon.

"5. Suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

"6. Suits, complaints or pleas, without regard to any distinction between law and equity, when the matter on controversary (controversy) shall be valued at or amount to five hundred dollars exclusive of interest.

"7. Contested elections. (Const., Art. 5.)"

Art. 1907. (1706) (1099) (1118) Matters of Probate.

"District courts shall have appellate jurisdiction and general control in probate matters over the county courts, for appointing guardians, granting letters testamentary and of administration, probating wills, settling accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 200; P. D. 1406; Amendment 1891.)"

Art. 1908. (1706) (1099) (1118) Over Commissioners Court.

"Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. (Id.)"

Art. 1909 (1706) (1099) (1118) General Jurisdiction.

"Such court shall have general original jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate as may be provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 22; P. D. 1406.)"

Art. 1910. (1707) (1100) (1119) Motions against sheriffs, attorneys, etc.

"The district court shall have power to hear and determine all motions against sheriffs and other officers of the

court for failure to pay over moneys, collected under the process of said court, or other defalcation of duty in connection with such process and of motions against attorneys for moneys collected by them and not paid over. (Acts 1846, p. 201, sec. 5; P. D. 1408; G. L., Vol. 2, p. 1507.)"

Art. 1911. (1708) (1101) (1120) May punish for contempt.

"The district court may punish any person guilty of contempt of such court by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days. (Acts 1846, p. 201; P. D. 1409; G. L., Vol. 2, p. 1507.)"

APPENDIX 6.

Articles 1949-1960, Revised Civil Statutes of Texas.

Article 1949. (1763) (1154) (1161) Exclusive original jurisdiction.

"The county court shall have exclusive original jurisdiction in civil cases where the matter in controversary (controversy) shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest. (Const., Art. 5, sec. 16; Acts 1876, p. 172; G. L., Vol. 8, p. 1008.)"

Art. 1950. (1764) (1155) (1162) Concurrent original jurisdiction.

"The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest. (Id.)"

Art. 1951. (1766) (1157) (1164) No jurisdiction.

"The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits of the recovery of lands, nor suits for the enforcement of liens upon land, nor of suits in behalf of the

State for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of corporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars. (Id.)"

Art. 1952. (1767) (1158) (1165) Appellate jurisdiction.

"The county court shall have appellate jurisdiction in civil cases over which the justice courts have original jurisdiction when the judgment appealed from or the amount in controversy shall exceed twenty dollars exclusive of costs. (Id.)"

Art. 1953. (1768) (1159) (1166) Certiorari to justice courts.

"The county court shall also have jurisdiction in cases brought up from the justice courts by certiorari."

Art. 1954. (1769) (1160) (1167) Motions against officers.

"The county court may hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process. (Acts 1876, p. 23; G. L., Vol. 8, p. 859.)"

Art. 1955. (1770) (1161) (1168) To punish for contempt.

"The county court may punish, by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, persons guilty of contempt of such court. (Acts 1846, p. 200; P. D. 1409; G. L., Vol. 2, p. 1506.)"

Art. 1956. (1771) (1169) Law and equity powers.

"Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. (Id.; P. D. 1410.)"

Art. 1957. (1772) (1163) (1170) To grant remedial writs.

"The county judge, either in term time or vacation, may grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. (Const., Art. 5, sec. 16; Acts 1876, p. 19; G. L., Vol. 8, p. 855.)"

Art. 1958. (1773) (1164) (1171) Appointing attorneys.

"The county judge may appoint counsel to attend to the cause of any party who makes affidavit that he is too poor to employ counsel to attend to the same. (Acts 1846, p. 200, sec. 11; P. D. 1414; G. L., Vol. 2, 1506.)"

Art. 1959. (1774) (1165) (1172) Additional authority.

"The county court and the county judge shall also have such authority as may be vested in them by law."

Art. 1960. (1775) (1166) Changed jurisdiction; eminent domain.

"Where the jurisdiction of a county court has been taken away, altered or changed by existing laws, the same shall remain as established, until otherwise provided by law. Jurisdiction shall obtain in all matters of eminent domain over which the county courts have jurisdiction by the general laws of this State. (Acts 1885, p. 77; G. L., Vol. 9, p. 697.)"

APPENDIX 7.

Articles 2385-2387, 2454, 2460, Revised Civil Statutes of Texas.

Art. 2385. (2291) (1568) (1539) Jurisdiction.

"Justice courts shall, in addition to their other powers and duties, have and exercise original jurisdiction in civil matters of all cases where the amount in controversy is two hundred dollars, or less, exclusive of interest, of which ex-

clusive original jurisdiction is not given to the district or county courts, and of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction. (Const., Art. 5, sec. 19; Acts 1876, p. 155; G. L., Vol. 8, p. 991.)"

Art. 2386. (2293-4-5-7) Other powers.

"Justices of the peace shall also have power:

"1. To punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day.

"2. To issue writs of attachment, garnishment and sequestration within their jurisdiction, the same as judges and clerks of the district and county courts.

"3. To exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this State.

"4. To proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him."

Art. 2387. (2296) (1573) (1544) No jurisdiction.

"Justice courts have no jurisdiction of suits in behalf of the State to recover penalties, forfeitures and escheats, of suits for divorce, of suits to recover damages for slander or defamation of character, suits for the trial of title to land, or of suits for the enforcement of liens on land. (Const., Art. 5, sec. 8.)"

Art. 2454. (2391) (1668) (1638) Appeal.

"A party to a final judgment in any justice court may appeal therefrom to the county court where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs, and in such other cases as may be expressly provided by law. (Acts 1876, p. 154; G. L., Vol. 8, p. 990.)

Art. 2460. (2398-99) Certiorari.

"A cause tried before a justice, wherein the amount in controversy or the judgment exceeds twenty dollars, exclu-

sive of costs, may be removed from such justice court to the county court by certiorari under the rules prescribed in the title and chapter relating thereto. Whenever a writ of certiorari to remove any cause from the justice court to the county court shall be served on any justice of the peace, he shall immediately make out a certified copy of the entries made on his docket, and of the bill of costs, as provided in case of appeals, and send same, together with the original papers in the cause, to the clerk of the county court in the manner and within the time prescribed in the preceding article."

APPENDIX 8.

Sections 3 and 6 of Article 5, Constitution of Texas.

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be coextensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a Statute of the State is held void. The Supreme Court and the Justices thereof shall have the power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The Supreme Court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive, at the capital of the State.

"The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. (Sec. 3, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891)."

"Sec. 6. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme Judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

"Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a (a) term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until other-

wise provided by law. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

"Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

"All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of (of) the Courts of Civil Appeals which may be hereafter created under this article after the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years, and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution. (Sec. 6, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

APPENDIX 9.

Articles 1728 and 1819, Revised Civil Statutes of Texas.

"Art. 1728 (1521) (940) (1011) Appellate jurisdiction.

The Supreme Court shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law arising in the following cases when same have

been brought to the Courts of Civil Appeals from final judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any question of law.

"3. Those involving the construction or the validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

"Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error." (Acts 1927, 40th Leg., p. 214, ch. 144.)

"Art. 1819. (1589), (996). Jurisdiction defined.

The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed One Hundred Dollars exclusive of interest and costs." (As amended Acts 1929, 41st Leg., p. 68, ch. 33, § 1.)

(5717-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 563

R. R. GROVEY,

Petitioner,

vs.

ALBERT TOWNSEND.

ON WRIT OF CERTIORARI TO THE JUSTICE COURT, PRECINCT NO. 1, POSITION NO. 2, HARRIS COUNTY, TEXAS.

BRIEF ON THE MERITS

Decision Below

The Decision below is not reported, but is printed in the Record at pages 14 and 18-19.

Jurisdictional Statement

(1) *Date of Judgment to be Reviewed*

The judgment which petitioner prays this Court to reverse was entered on September 24, 1934 (R. 14); and petitioner's motion for a new trial was overruled on September 25, 1934 (R. 18-19). The petition for the writ of certiorari was filed December 6, 1934, and was granted January 14, 1935.

(2) *Specific Claims Below*

(a) That Sections 2 and 27 of Article 1 (Bill of Rights) of the

Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, to authorize the disenfranchisement of which petitioner complains, violate petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10). Sections 2 and 27 of Article 1 read as follows:

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a Republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The court below in the case at bar sustained the validity of these Texas constitutional provisions so construed.

(*b*) Petitioner set up and claimed below that respondent had deprived him of his civil right to vote in the statutory Democratic primary election involved in this case; that this civil right to vote was protected against infringement by the Fourteenth and Fifteenth Amendments to the Constitution of the United States; and that this civil right had been denied and abridged by respondent as an officer of the State of Texas, and by agencies of government within the meaning of *Nixon* v. *Condon*, 286 U. S. 73 (R. 3, 8, 12).

(c) Petitioner claimed that he had a right, created by the Constitution of the United States, to vote for United States Senator and Representative in the election involved in this case, and that respondent had deprived petitioner of that right. (R. 7, 11).

These Federal claims were denied by the court below.

(3) *Statutory Provision Believed to Sustain Jurisdiction*

First. In Texas, there are three courts of original jurisdiction: District Courts, County Courts, and Justice Courts; District Courts and County Courts also have certain appellate jurisdiction. The jurisdiction of these courts, respectively, is provided for in Article

5, Sections 8, 16, and 19 of the Texas Constitution; and Articles 1906-1911, 1949-1960, and 2385-2387, 2454, 2460 of the Revised Civil Statutes of Texas, 1925. (These provisions are printed herewith as Appendices 4, 5, 6, and 7, respectively.)

Second. The Justice Court, because of the amount involved, was the only court having jurisdiction of the instant case under the constitution and laws of Texas. See Appendices 4, 5, 6, and 7.

Third. Because of the amount involved, no appeal was allowed from the judgment in the instant case to any other court, by the constitution and laws of Texas, either as of right or by permission of any court or judge, after application therefor. See Appendices 4, 5, 6, and 7; *Gulf, etc. R. Co.* v. *Rowlings*, 80 Texas 579, 16 S. W. 430; *Arrington* v. *People's Supply Co.*, (Tex. Civ. App.) 52 S. W. (2d) 678; 26 Texas Jurisprudence, Sec. 82, p. 879.

The law in Texas with regard to appeals from Justice Courts is stated very clearly in *Hudson v. Smith*, (Tex. Civ. App.) 133 S. W. 486 (writ of error denied by Supreme Court of Texas, see note 133 S. W. 486), as follows (p. 488):

> "Neither the Constitution nor the law gives the right of appeal from judgments of the justices' courts when the amount in controversy is not more than $20, exclusive of costs. An appeal is not a matter of right, but the right is conferred by the Constitution or statute. In the absence of such grant, the right does not exist. A judgment from which there can be no appeal is conclusive between the parties, unless absolutely void. The amount in controversy in the case wherein the judgment is sought to be enjoined was less than $20, and therefore within the exclusive jurisdiction of the court which rendered it, from which no appeal could be taken."

The appellate jurisdiction of the Courts of Civil Appeals and the Supreme Court of Texas is found in Article 5, Sections 3 and 6, of the Constitution of Texas, and Articles 1728 and 1819 of the Revised Civil Statutes of Texas, 1925. These provisions are printed herewith as Appendices 8 and 9, respectively.

Fourth. The record thus disclosing that "a final judgment or decree has been rendered or passed by the highest court" of Texas "in which a decision could be had" in the instant case, this Court has jurisdiction to review the decision below upon certiorari under

Section 237 (*b*) of the Judicial Code, Section 344 (*b*) of Title 28 of the United States Code.

(4) *Cases Believed to Sustain Jurisdiction*

Jurisdiction was held to exist in *Nixon* v. *Herndon*, 273 U. S. 536, and in *Nixon* v. *Condon*, 286 U. S. 73, to review identical Federal questions involved in this case. The identical Federal claims sustained by this Court upon the merits in the *Nixon Cases* were denied by the court below in the case at bar (R. 14, 18).

The authorities are unanimous that this Court has jurisdiction to review a final judgment of an inferior state court, where no appeal of any kind lies from that inferior court's judgment.

The general proposition is stated in the opinion of this Court in *Kentucky* v. *Powers*, 201 U. S. 1, 37, as follows:

> "But, it is said that the action of the trial court in refusing to quash the indictment or the panel of petit jurors, although the motion to quash was based on Federal grounds, cannot, under the laws of Kentucky, be reviewed by the court of appeals, the highest court of that commonwealth. If such be the law of Kentucky, as declared by the statutes and by the court of appeals of that commonwealth, then, after the case is disposed of in that court by final judgment, in respect of the matters of which, under the local law, it may take cognizance, a writ of error can run from this court *to the trial court* as the highest court of Kentucky *in which a decision of the Federal question could be had;* and this court in that event, upon writ of error, reviewing the final judgment of the trial court, can exercise such jurisdiction in the case as may be necessary to vindicate any right, privilege, or immunity specially set up or claimed under the Constitution and laws of the United States, and in respect of which the decision of the trial court is made final by the local law; that is, it may re-examine the final judgment of the trial court so far as it involved and denied the Federal right, privilege, or immunity asserted. This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed."

In the case *of The Moses Taylor v. Hammons*, 18 L. Ed. 397,

suit was, as in the instant case, brought in a justice court. Under the California law, the state in which the suit was brought, an appeal lay to the county court, whose judgment, on account of the amount involved, was non-appealable. This Court reviewed and reversed the judgment of the county court, saying upon the jurisdictional question (p. 400):

> "The decision of the county court was the decision of the highest court in the State which had jurisdiction of the controversy. From that court, therefore, the case is brought here by writ of error."

Other cases upholding the same principle are:

Downham v. *Alexandria*, 19 L. Ed. 807.

Missouri, etc. v. *Elliott*, 184 U. S. 530.

Western Union v. *Hughes*, 203 U. S. 505.

Section 3214 of Hughes' Federal Practice states the broad principle as follows:

> "It makes no difference how minor or unimportant the state court may be if its decision is final and there is no higher court having jurisdiction."

Statement of the Case

First. This is the fourth time that a Negro citizen has found it necessary to apply to this Honorable Court for the protection of his civil right to vote in the statutory Democratic primary elections of Texas.

(*a*) *In Love* v. *Griffith* (decided October 20, 1924), 266 U. S. 32, the question was moot before it reached this Court, but this Court said that "If the case stood here as it stood before the court of first instance it would present a grave question of constitutional law and we should be astute to avoid hindrances in the way of taking it up."

(*b*) In *Nixon v. Herndon* (decided March 7, 1927), 273 U. S. 536, the question was not moot and the Negro's constitutionally protected civil right to vote in the statutory Democratic primary elections of Texas was established beyond doubt and a Texas statute which sought to destroy the right was declared unconstitutional, this Court saying that "it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the *right* set up in this case." (Italics ours.)

(c) *Nixon* v. *Condon* (decided May 2, 1932), 286 U. S. 73, arose when, taking refuge behind the rule that the Fourteenth and Fifteenth Amendments are restraints upon the states and not upon private individuals, another Texas statute, passed as was said because of "an emergency and imperative public necessity" created by *Nixon* v. *Herndon, supra*, "lodged the power" (as this Court found in *Nixon* v. *Condon, supra*) in the State Democratic Executive Committee of Texas to deprive Negroes of their civil right to vote in the Texas statutory Democratic primary elections. This Court held that the State Committee was an organ "of the State itself" and laid down the broad rule that (p. 88) "Whether, in given circumstances, parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this Court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere."

(d) Following the second *Nixon Case*, Negroes were again deprived of their civil right to vote in the statutory Democratic primary elections of Texas, and the instant case presents the fourth challenge to the constitutionality of that deprivation, under the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Resolution Involved

Second: In *Nixon v. Condon, supra*, as proof that the State Democratic Executive Committee of Texas had no power by virtue of its being to say what citizens could become Democrats and what citizens could not, this Court made the following statement at page 84: "Whatever inherent power *a State political party* has to determine the content of its membership resides in the State convention. Bryce, Modern Democracies, vol. 2, p. 40." (Italics ours)

Assuming that the Democratic Party is a "state political party" —which petitioner alleges that it is not—and placing a favorable significance upon the word "Whatever" in the above quotation from this Court, the State Democratic Convention of Texas promptly passed, on May 24, 1932, the following resolution (R. 7):

> "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and Laws of the State shall be eligible to membership in the Democratic party and as such eligible for participation in its deliberations" (the primaries). See *Bell* v. *Hill*, 74 S. W. (2d) 113,

and *Mason* v. *Committee*, 74 S. W. (2d) 326, where this difference in reading of resolution may be found.

State Constitutional Provisions and Court Decisions Challenged in Instant Case

Third. Since its adoption and the deprivation under its authority of the legal right of Negroes to vote in the statutory Democratic primary elections of Texas, the above resolution has been before two Texas Courts of Civil Appeals and the Supreme Court of Texas. *County Democratic Executive Committee* v. *Booker*, 53 S. W. (2d) 123; *Bell* v. *Hill*, 74 S. W. (2d) 113; and *Mason* v. *County Democratic Executive Committee*, 74 S. W. (2d) 326. These cases are tacitly relied upon by the court below as authority for the judgment in the instant case.

(*a*) In the *Booker Case* (Cobbs, J. dissenting) the Court of Civil Appeals at San Antonio, through Special Justice Searcy, thought that its decision upholding the resolution was "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*." Expressing the same thought the late Chief Justice Fly, in a concurring opinion, said (p. 129) that *Nixon* v. *Condon*, "after destroying the ship of party power and rule, threw out a spar upon which the party might keep its head above the tumultuous political sea of 1932, that spar being the convention of the party, not acting on any State mandate, but on its unfettered volition." But this spar was discovered only after the Chief Justice had thus written (p. 129): "However much the logic and strength of the minority opinion in the case of *Nixon* v. *Condon*, herein cited, may excel those of the majority opinion, however much we may differ with the majority opinion, representing only five of the nine judges of the Federal Supreme Court, still it is the law of the land, and this Court will endeavor to follow not only its spirit but its letter."

(*b*) The *Mason Case* merely followed the *Booker* and *Bell Cases*.

(*c*) In the *Bell Case*, decided July 20, 1934, the Supreme Court of Texas gave its approval to the *Booker Case*, but expresely disagreed with this Court's decision in *Nixon* v. *Condon*, *supra*, saying through Chief Justice Cureton (p. 121):

> "Justice Cardozo held that a proper construction of this statute was that the power to declare the membership of the party had been conferred upon the State Committee by law,

> and that the effect of this was to make the committee a state agency, which could not discriminate between the white and Negro races in fixing the membership of the Democratic Party. *With this construction of this Texas statute we cannot agree.* The State Executive Committee of the Democratic Party in Texas is just what its name implies—a committee clothed with executive power to carry out the will of the party." (Italics ours.)

The Supreme Court of Texas further held that, if this Court's construction of Article 3107 of the Revised Civil Statutes of Texas should prevail upon the proposition of whether the State Democratic Executive Committee was an agency of government within the 14th or 15th Amendment (which this Court said in *Nixon* v. *Condon* it "will determine for itself"), then said statute would be "plainly void, because in violation of sections 27 and 2 of the Bill of Rights" (Article 1) of the Texas Constitution, which read as follows (R. 10):

> "Sec. 2. All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."
>
> "Sec. 27. The citizens shall have the right, in a peaceable manner, to assemble together for their common good; and apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address or remonstrance."

The Supreme Court of Texas further held (p. 119) that the power thus to discriminate against Negroes was guaranteed and protected by "the first section of the Bill of Rights, the First Amendment to the Constitution of the United States."

Petitioner challenges said Sections 2 and 27 of Article 1 (Bill of Rights) of the Constitution of Texas, thus construed, and the decisions construing them, as violating petitioner's rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 10).

Petitioner's Injury

Fourth. On July 28, 1934, a statutory Democratic primary elec-

tion was held in the State of Texas, of the same character as the ones involved in *Nixon* v. *Herndon* and *Nixon* v. *Condon, supra*, at which nominations, equivalent to election, were made of United States Senator, United States Congressman, and state, district, county and precinct officers.

In obedience to the mandate of Article 2956 of the Revised Civil Statutes of Texas, absentee voting was being conducted on July 9, 1934, by the respondent, Albert Townsend, who was the duly elected, qualified, and acting county clerk of Harris County, Texas. Said article 2956 is quoted in full in petitioner's original petition (R. 4), the pith of which reads:

> "Art. 2956. Absentee Voting. Any qualified elector, as defined by the laws of this State, who expects to be absent from the County of his or her residence on the day of election may vote subject to the following conditions, to wit: At some time, not more than twenty (20) days nor less than three (3) days prior to the date of such election, such elector shall make his or her personal appearance before the Clerk of the County of his or her residence and shall deliver to such Clerk his or her poll tax receipt or exemption certificate entitling him or her to vote at such election, and said Clerk shall deliver to such elector one ballot which has been prepared in accordance with the law for use in such election .... The provisions of this article shall apply to all elections, including General, Special, and Primary elections."

The petitioner was on said July 9, 1934, a "qualified elector, as defined by the laws of" Texas; was a member of and believer in the tenets of the Democratic Party; expected to be absent from his county on said election day; made his personal appearance before the respondent and delivered to respondent petitioner's poll tax receipt entitling petitioner to vote in the election involved in this case; but respondent refused to deliver to petitioner a ballot or to permit petitioner to vote in said election, respondent giving as his sole reason and justification the fact that petitioner was a Negro, and that under the above quoted resolution of the State Democratic Convention of Texas and under instructions from the County Democratic Executive Committee of Harris County, Texas, petitioner was ineligible to vote in said election, solely and only because petitioner was a member of the Negro race.

Instant Suit Brought

Fifth. Feeling himself aggrieved and damaged by his said disenfranchisement in the sum of Ten Dollars (ten times the damages awarded by the jury in *Nixon* v. *Herndon, supra;* ten times the amount agreed as the measure of damages by the parties in *Nixon* v. *Condon, supra;* and twice the amount of damages awarded upon a trial to the United States District Judge without a jury in *Nixon* v. *McCann,* No. 1660 Law, U. S. District Court, Western District of Texas, decided February 7, 1934, but not officially reported; twice the amount of damages awarded by the jury in *Bliley* v. *West,* 42 F. (2d) 101;—see certified copies of judgments in *Nixon Cases* printed herewith as Appendices 1, 2, and 3), petitioner, on September 10, 1934, brought suit for ten dollars ($10.00) damages in Justice Court, Precinct No. 1, Position No. 2, Harris County, Texas. Because of the amount involved, the Justice Court was the only Texas Court having jurisdiction; and no appeal lies from the judgment in such cases. Article 5, Section 19, Constitution of Texas; Articles 2385 and 2454, Revised Civil Statutes of Texas.

Petitioner filed a petition in said action in the Justice Court (R. 1) setting out the matters and things set forth above, and in addition thereto, the following pertinent facts:

1. That the petitioner, R. R. Grovey, is and was on July 9, 1934, a natural born citizen and resident of the United States and the State of Texas, was 44 years of age, a member of the Negro race, had resided in Harris County, Texas, for 18 years and in his voting precinct No. 85 for 4 years, next preceding the holding of the statutory Democratic primary election involved in this case, had paid his poll tax as required by law and held his official receipt therefor, was a duly qualified elector under the laws of the United States and the State of Texas, was subject to none of the disqualifications for voting provided for under the constitution and laws of Texas, and was a member of and believer in the tenets of the Democratic Party (R. 1).

2. That Articles 3101 and 3102 of the Revised Civil Statutes of Texas (quoted in the petition, R. 2) required the holding of a statutory Democratic primary election on July 28, 1934; that said election was held pursuant to the mandatory requirements of said articles, and that petitioner had a legal right to vote therein, which right was protected by the Fourteenth and Fifteenth Amendments to the Constitution of the United States (R. 3).

3. That Article 3107 of the Revised Civil Statutes of Texas (construed by this Court in *Nixon* v. *Condon, supra*) provides in part that "no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

That the immunities thus granted to the classifications of "former political views or affiliations" and "membership or non-membership in organizations other than the political party" have been held valid by the Supreme Court of Texas in *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515; and that the failure of the Supreme Court of Texas to extend the same immunity to the classification of "race and color" in the *Bell* v. *Hill Case, supra*, was a denial to petitioner and all other qualified Negro voters of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment and an abridgement of petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 9-10).

That the decision of the Supreme Court of Texas in the *Bell* v. *Hill Case* was the culmination of a consistent course of statutory enactments and judicial decisions, since the original passage of the statutory primary election laws of Texas, under which the State of Texas has deprived the managers of said elections of all power to fix qualifications for voting therein, inconsistent with the qualifications for electors provided in the constitution and laws of Texas, except in the one instance where the managers of such elections have been authorized and permitted and protected by said "course of legislative enactment and judicial decisions in excluding Negroes from voting in said statutory primary elections." (R. 11)

4. "That the Democratic Party is a national organization, and that the Democratic Party has not passed any rule or resolution or order excluding Negroes, and has not authorized any of its agencies or branches to pass any resolution, rule, or order excluding Negroes, or forbidding Negroes from becoming members of the Democratic Party, and that no State convention of the Democratic Party has the power by virtue of its being to pass any such rule, resolution, or order, and that the Democratic Party has never conferred power upon the State Democratic Convention of Texas to pass any such resolution, rule, or order." (R. 11).

5. That the respondent, Albert Townsend, is a State officer of the State of Texas, who exercises only functions delegated to him by the laws of the State and whose compensation and salary are paid out of the tax money to which petitioner has contributed and is required to contribute by the laws of the State of Texas (R. 12).

6. That the State Democratic Convention of Texas and the County Democratic Executive Committee of Harris County, Texas, are agencies of government within the meaning of the Constitution of the United States and *Nixon* v. *Condon, supra* (R. 12).

Demurrer to Petition

Sixth. The respondent, Albert Townsend, filed his demurrer to petitioner's petition as follows: "The defendant demurs generally to the plaintiff's petition and says it is insufficient in law and states no cause of action . . . ." (R. 13.)

Decision of Court

Seventh. On September 24, 1934, the Justice Court entered its judgment sustaining the general demurrer and dismissing petitioner's petition, and entering judgment for respondent (R. 14).

Motion for New Trial

Eighth. On September 25, 1934, petitioner filed his motion for a new trial in which he urged upon the Justice Court in detail that said judgment denied petitioner the due process of law and equal protection of laws guaranteed by the Fourteenth Amendment and abridged petitioner's right to vote in violation of the Fifteenth Amendment to the Constitution of the United States (R. 15).

No Appeal Permitted

Ninth. The amount involved being less than $20.00 no appeal or review is permitted (either as a matter of right or as a matter of discretion) to any higher State court of the State of Texas.

Certiorari

Tenth. On January 14, 1935, this Court granted a writ of Certiorari to review the judgment of the court below.

Summary of Argument

Point Number One

The election involved in this case was an election which was held

under statutory compulsion, which was wholly statutory, and in which those charged with its management have been deprived by Texas statutes and judicial decisions of all power to fix qualifications and tests for participation therein, inconsistent with the qualifications and tests fixed by Texas laws; except in the one instance where such managers have been "guaranteed" the power to deny Negroes the right to participate in such elections. In an election of this character the State of Texas cannot annul the franchise guaranties of the 14th and 15th Amendments to the Federal Constitution by the simple device of labels. Its name is the name of the Democratic Party, but the voice of the election involved in this case is the voice of the State.

Point Number Two

Nixon v. *Herndon*, 276 U. S. 536, established that in Texas a qualified Negro citizen has the same civil right to vote in the election labeled the statutory Democratic primary election as he does in the election labeled the general election.

Point Number Three

Petitioner had a right created by the Constitution of the United States to vote for United States Representative and United States Senator in the election involved in this case.

Point Number Four

Petitioner had a right, created by the 15th Amendment to the Constitution of the United States, to "an exemption from discrimination in the exercise of the elective franchise" in the election involved in this case, "on account of race, color or previous condition of servitude;" and the 15th Amendment by its own self-operating force struck down race and color as a barrier to voting in the election involved in this case, leaving petitioner with the same right to vote in that election which was possessed by qualified voters who were not Negroes.

Point Number Five

The State Democratic Convention of Texas, which passed the resolution involved in this case, was a creature of statute, and as such was an agency of the State, which could not constitutionally do what its creator was prohibited by the Constitution of the United

States from doing.

Point Number Six

Petitioner believes that there is not properly involved in this case any question of party membership; but that, if there is, the Democratic Party, as was true in *Nixon* v. *Condon*, 286 U. S. 73, has not yet spoken that Negroes may not be Democrats.

Point Number Seven

Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Statutes of Texas, as upheld by the Supreme Court of Texas in the case of *Love* v. *Wilcox*, 28 S. W. (2d) 515.

ARGUMENT

Point Number One

The election involved in this case is an election which was held under statutory compulsion, which was wholly statutory, and in which those charged with its management have been deprived by Texas statutes and judicial decisions of all power to fix qualifications and tests for participation therin, inconsistent with the qualifications and tests fixed by Texas laws; except in the one instance where such managers have been "guaranteed" the power to deny Negroes the right to participate in such election. In an election of this character the State of Texas cannot annul the franchise guaranties of the 14th and 15th Amendments to the Federal Constitution by the simple device of labels. Its name is the name of the Democratic Party, but the voice of the election involved in this case is the voice of the State.

No principle is more firmly settled by the decisions of this Court than the doctrine that, in determining whether constitutional guaranties have been violated, this court will look "to substance, not to form," *Chicago B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234-235;

and that states cannot escape the paramount authority of the Constitution of the United States by tacking upon that which is constitutionally prohibited the label of that which under certain circumstances this Court may find to be constitutionally permissible.

Thus, when a Governor of Texas sought to escape from constitutional restraint by masking his conduct behind the label "martial law," this Court held in *Sterling* v. *Constantin*, 287 U. S. 378, 397, that "There is no such avenue of escape from the paramount authority of the Federal Constitution."

Likewise, when in *Life & Casualty Insurance Co. of Tennessee* v. *McCray*, 291 U. S. 566, 573, this Court was urged to determine the validity of a statutory exaction by the label "penalty," it was held that "the measure, not the name controls."

So, also, if the election involved in the case at bar is measured by its nature instead of its name, it will be found to be no different in statutory substance from the election labeled "general election," which followed on November 6, 1934. A comparison between the two elections will demonstrate this to be true.

Election Labeled "GENERAL ELECTION" and Held November 6, 1934	*Election Labeled "PRIMARY ELECTION" Held July 28, 1934.*
1. Held under compulsion of Article 2930 of Revised Civil Statutes of Texas, 1925.	1. Held under compulsion of Article 3101 of Revised Civil Statutes of Texas, 1925.
2. Date fixed by Article 2930.	2. Date fixed by Article 3102.
3. Article 2930 fixes time of day for holding election.	3. Article 2930 fixes time of day for holding election.

4. Article 2939 requires that all election officials shall be qualified voters.	4. Article 2939 requires that all election officials shall be qualified voters.
5. Article 2955 fixes same qualifications for voting in this election as in "statutory primary election."	5. Article 2955 fixes same qualifications for voting in this election as in election labeled "general election."
6. Article 2956 (Absentee Voting) is same for this election as for "statutory primary election."	6. Article 2956 (Absentee Voting) is the same for this election as for general election.
7. Article 2978 provides that only Official Ballot shall be used.	7. Article 2978 provides that only Official Ballot shall be used.
8. Articles 2980-2981 provide form of ballot and how to mark ballot.	8. Articles 3109, 3110 provide form and contents of ballot. Also Art. 3109 fixes method of marking ballot.
9. Article 2984 fixes the number of ballots to be provided.	9. Article 3109 fixes number of ballots to be provided.
10. Articles 2986, 2987 and 2990	10. Article 3120 provides that

provide for voting booths, guard rails, and ballot boxes for this election.

voting booths, guard rails, and ballot boxes of "general election" may be used in compulsory statutory primary election.

11. Article 2998 fixes oath to be taken by officials in this election.

11. Article 3104 requires officials of this election to take same oath as officials of "general election."

12. Power of judges fixed by Article 3002 as follows:

"Judges of election are authorized to administer oaths to ascertain all facts necessary to a fair and impartial election. The presiding judge of election, while in the discharge of his duties as such, shall have the power of the district judge to enforce order and keep the peace. He may appoint special peace officers to act as such during the election and may issue warrants of arrest for felony, misdemeanor or breach of peace committed at such election, directed to the sheriff or any constable of the county, or such special peace officer, who shall forthwith execute any such warrants, and, if so ordered by the presiding judge, confine the party arrested in jail during the election or until the day after

12. Power of judges fixed by Article 3105 as follows:

"Judges of primary elections have the authority, and it shall be their duty, to administer oaths, to preserve order at the election, to appoint special officers to enforce the observance of order and to make arrests, *as judges of general elections are authorized and required to do.* Such judges and officers shall compel the observance of the law that prohibits loitering or electioneering within one hundred feet of the entrance of the polling place, and shall arrest, or cause to be arrested, any one engaged in the work of conveying voters to the polls in carriages or

the election, when his case may be examined into before some magistrate, to whom the presiding judge shall report it; but the party arrested shall first be permitted to vote, if entitled to do so unless he is drunk from the use of intoxicating liquor, then he shall not be permitted to vote until he is sober."	other mode of conveyance, except as permitted by this title." (Italics ours.)
13. Articles 3003 to 3025 contain elaborate provisions for securing purity of the ballot box.	13. Article 3122 provides: "The same precautions required by law to secure the purity of the ballot box in general elections, in regard to the ballot boxes, locking the ballot boxes, sealing the same, watchful care of them, the secrecy in preparing the ballot in the booth or places prepared for voting shall be observed in all primary elections."
14. Article 3028 requires delivery of sealed ballot boxes containing ballots, etc. to County Clerk after this election.	14. Article 3128 requires delivery of sealed ballot boxes containing ballots, etc. to County Clerk after this election.
15. Article 3041 provides for contest of this election before district court.	15. Article 3146 provides for contest of this election before district court.

So far as statutory creation is concerned it is manifest that the only difference between these two elections is a difference in name.

So far as judicial interpretation by the appellate courts of Texas is concerned, petitioner believes that an analysis of the cases shows only the difference of the Negro vote.

(a) The clearest contrast is between the cases of *Love* v. *Wilcox*, 28 S. W. (2d) 515, and *Bell* v. *Hill*, 74 S. W. (2d) 113, decided by the Supreme Court of Texas.

In the *Love Case*, when the question of the franchise rights of Negroes was not involved, the statutory primary election was a matter of great public interest and the court found in Sections 2 and 27 of Article 1 (Bill of Rights) of the Texas Constitution authority for statutes conferring original jurisdiction upon the Supreme Court of Texas to use its extraordinary writ of mandamus to prohibit the establishment of past party affiliations (the historical and traditional test of party loyalty) or membership or non membership in organizations (like the Ku Klux Klan) other than the political party, as qualifications or tests for participation in the statutory primary elections. The Supreme Court of Texas held in the *Love Case* (pp. 520, 525):

> "Whenever the uncontradicted facts show that a relator has the right to exact performance by *public functionaries* of duties imposed on them by law, his appropriate remedy is the writ of mandamus. *No questions could arise of wider public interest or of graver importance to the state* than those involving abridgement of *rights of citizens to participate in government* through the selection of those who may become public officials by means of party nominations." (Italics ours.)
>
> "Moreover, the language of article 3107 is fairly susceptible of no other interpretation than that the Legislature intended the same qualifications to be prescribed by the State Committee for *all* participating in a party primary, *whether as voters or candidates*, and further that the same qualifications must be prescribed for all candidates." (First Italics theirs; second Italics ours.)

In the *Bell Case*, when the rights of Negroes to vote come into the picture, the managers of the statutory primary election are no longer "public functionaries" having duties "imposed upon them

by law;" the questions involved are no longer "of wider public interest or of graver importance to the state;" Article 3107 no longer requires the fixing of "the same qualifications for . . . *all* . . . whether as voters or candidates;" and when it was suggested that the levelling powers of the 14th Amendment, as announced by this Court in *Nixon* v. *Condon, supra*, might compel equal treatment of Negroes, the Supreme Court of Texas, while expressly disagreeing with *Nixon* v. *Condon*, held that whether the view of the Supreme Court of the United States should avail "is not a matter of any particular consequence here;" since Article 3107 would then be plainly void as being in violation of the same provisions of the Texas Constitution (Sections 2 and 27 of Article 1—Bill of Rights) in which in the *Love Case* the Supreme Court of Texas found authority for statutes which authorized it to use its extraordinary writ of mandamus to prohibit the fixing of past party affiliations or membership or non-membership in organizations other than the political party as tests for voting in the statutory primary election.

In other words, if the classification sought to be established is based upon race and color, Sections 2 and 27 of Article 1 of the Texas Constitution "guarantee" it; but if past party affiliations (the traditional test of party loyalty) or membership or non-membership in organizations other than the political party is the basis of the classification, then Sections 2 and 27 of Article 1 of the Texas Constitution forbid it.

(b) In *Koy* v. *Schneider*, 218 S. W. 479, the Supreme Court of Texas had before it a statute which the court described as follows (p. 479): "The act of the Legislature confers the right to vote on women possessing the qualifications, save of sex, of electors under the Constitution and laws of the state, at any and all primary elections or nominating conventions to be held under the laws of the state, and requires each woman offering to vote in any primary election or convention, after January 1, 1919, to comply with all provisions of our laws requiring and permitting voting on payment of poll taxes."

The question before the Supreme Court of Texas was whether the word "election" as used in Section 2 of Article 6 (the suffrage section) of the Constitution of the State (adopted prior to the creation of the statutory primary election) was broad enough to include the statutory primary election. If so, then Negroes would

be eligible; if not, then the legislature had power to confer the right to vote upon women. The court held that (p. 483):

> "There being no constitutional prohibition, it follows that the Legislature was free to extend the privilege of participation in party primaries and conventions to women possessing the qualifications, save sex, of electors under our Constitution and laws. . . ."

Chief Justice Phillips in his dissent was pressing the contention that *Ashford* v. *Goodwin*, 131 S. W. 535, was controlling, in that there it had been held that the word "election" in Section 8 of Article 5 of the Texas Constitution (adopted prior to the creation of the statutory primary election and conferring jurisdiction on the district courts to hear contested elections) was broad enough to include the statutory primary election. The Supreme Court of Texas disposed of *Ashford* v. *Goodwin* as follows:

> "That decision can be rightly understood by bearing in mind its underlying principle, announced by the court, per Judge Brown, immediately after the statement of the case in these words:
>
> 'When the Legislature passed that act, they must, in the discharge of their duty, have determined that the power to so enact was conferred upon that body by the language we have quoted above from section 8 of article 5 of the Constitution as amended. The Legislature having determined that the power was granted to that body to pass the law, this court must sustain it unless its invalidity be apparent beyond a reasonable doubt.'
>
> "Here, the Legislature necessarily determined that Section 2 of Article 6 left them free to fix the qualifications of participants in primaries, and, since we cannot say that the legislative determination was wrong beyond a reasonable doubt, we must sustain it."

(c) In *Briscoe* v. *Boyle*, 286 S. W. 275 (cited with approval in *Love* v. *Wilcox*, *supra*, and in *County Democratic Executive Committee* v. *Booker*, *infra*), the Court of Civil Appeals at San Antonio held that "In this State the qualifications of persons entitled to vote in general elections are fixed by the Constitution, and, except those excluded by express restrictive provisions in the statutes (only

Negroes were at that time excluded by such express provisions in the statutes), all persons qualified to vote in general elections are entitled to participate in party primary elections." In *County Dem. Ex. Committee* v. *Booker*, 53 S. W. (2d) 123, the Court of Civil Appeals at San Antonio held that the exclusion of Negroes from participation in the statutory Democratic primary elections is "in line with the opinion of the Supreme Court of the United States in *Nixon* v. *Condon*."

(d) In *Clancy* v. *Clough*, 30 S. W. (2d) 569, the Court of Civil Appeals at Galveston (the Texas Judicial District in which the case at bar arose) affirmed a judgment of the trial court enjoining the defendants "from placing upon the official ballot any pledge other than that prescribed by the statute, or one containing the additional word 'white' before the word 'Democrat' in the pledge prescribed by the statute." In *White* v. *Lubbock*, 30 S. W. (2d) 722, the Court of Civil Appeals at Galveston, with more consistency, held that the resolution stricken down by this Court in *Nixon* v. *Condon*, *supra*, was "a valid exercise" of the "party's inherent power."

(e) In *Hamilton* v. *Monroe*, 287 S. W. 304, 305, the Court of Civil Appeals at Waco said:

> "The regulation of party nominations is entirely statutory. The Supreme Court of this State has held that the only rights candidates for party nomination in primary election contests have are those given by the statutes."

(f) In *Gilmore* v. *Waples*, 188 S. W. 1037, 1040, the Supreme Court of Texas asked:

> "For what purpose and to what end, it may appropriately be inquired, have the various statutes in relation to party nominations been enacted in this State if the rights and duties therein defined and the matters they purport to govern still present mere political questions, to be settled alone by party law and in the party forum, and are therefore beyond the cognizance of the courts?"

(g) In *Hamilton* v. *Davis*, 217 S. W. 431, 434, (cited with approval by the Supreme Court of Texas in *Koy v. Schneider*, *supra*), the Court of Civil Appeals at Austin said:

> "If the Legislature can prescribe the qualifications of voters in an election for officers to fill offices created by it, but not

by the Constitution, it can assuredly do so in primary elections, *which are solely the creatures of the statute . . .*" (Italics ours)

The Legislature has, by Articles 2955 and 2956, Revised Civil Statutes of Texas, 1925, prescribed the qualifications of voters in the statutory primary elections, the pith of which sections is as follows:

Art. 2955. "Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States, and who shall have resided in this State one year next preceding an election, and the last six months within the district or county in which he or she offers to vote, shall be deemed a qualified elector.....; provided that any voter who is subject to pay a poll tax under the laws of this State or ordinances of any city or town in this State, shall have paid said tax before offering to vote at any election in this state and holds a receipt showing that said poll tax was paid before the first day of February next preceding such election . . . *The provisions of this article as to casting ballots shall apply to all elections including general, special and primary elections.*" (Italics ours)

Art. 2956—"*Any qualified elector, as defined by the laws of this state,* who expects to be absent from the county of his or her residence on the day of election may vote subject to the following conditions, to wit;" (Italics ours.) This is the Absentee Voting Section, is the section involved in this case, and is quoted in full in the record at page 4).

These statutory qualifications have been respected in Texas in every case, except where Negroes offered to vote. For instance, the Attorney-General of Texas handed down an opinion during the summer of 1934, holding that Mexicans had a right to vote in the election involved in this case. He also handed down an opinion holding that Negroes had no such right. See *Bell* v. *Hill*, 74 S. W. (2d) 113, 120. The reason why the Attorney General of Texas should be defining the right to vote in the election involved in this case,—if it is the election of a private association,—is the simple fact that it is not the election of a private association, but is "solely the creature of the statute." *Hamilton* v. *Davis, supra.*

Besides, the election involved in this case, though bearing the name of the sham battle, was in fact the real battle; and the election

labeled the real battle was in fact the sham battle. It was so alleged by the petitioner below (R. 11). It is a matter of common and general knowledge of which this Court may take judicial notice. *Muller* v. *Oregon*, 208 U. S. 412, 421. It is commonly and generally known that the total number of ballots cast in the election involved in this case for Governor, for instance, was 994,003. (Houston Chronicle, August 12, 1934, p. 15), while the total number of ballots cast in the election labeled "general election," for governor was 437,077 (House Journal, 44th Tex. Leg., Reg. Sess., Jan. 11, 1935, p. 64). It is also commonly and generally known that, since the creation of the statutory primary elections of Texas, the statutory Democratic primary elections have always been the real battles and the general elections the sham battles. It is this commonly and generally known fact which explains why Old Article 3107 of the Revised Civil Statutes of Texas, stricken down by this Court in *Nixon* v. *Herndon*, *supra*, only sought to disenfranchise Negroes in the statutory Democratic primary election.

Petitioner does not question the right of the Texas appellate courts to construe the statutory primary election laws of the state. But when those laws, as said by this Court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373, are construed "with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," then petitioner feels justified in asking this Court to measure the election involved in this case, not by what the state may call it, but by what it is in fact—*a creature of the statute*—and to enforce against the election involved in this case not merely the constitutional guaranties which apply to private associations, but the constitutional guaranties which are vouchsafed in an election of the state. What are those guaranties?

Point Number Two

Nixon v. Herndon, 276 U. S. 536, established that in Texas a qualified Negro citizen has the same civil right to vote in the election labeled the statutory Democratic primary election as he does in the election labeled the general election.

Mr. Justice Holmes, rendering the opinion of this Court, said (p. 540) that "the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote

at the primary election that may determine the final result."

The Circuit Court of Appeals for the Fifth Circuit, in *Nixon* v. *Condon*, 49 Fed. (2d) 1012, 1013, expressed the same view of *Nixon* v. *Herndon*, *supra*:

> "It is of course to be conceeded, since the decision in *Nixon* v. *Herndon*, *supra*, that the right of a qualified citizen to vote extends to primary elections as well as to general elections."

The reason that allows a recovery for denying a vote at a final or general election is not that the defendant, who may deny the vote, is a state officer, but that, because of the nature of the election (not its name), plaintiff has a legal civil right to vote in the election and the defendant has a legal duty not to deny the vote. Substantial allegations of action by the state may, under certain circumstances, be necessary to give the Federal Courts jurisdiction to redress the wrong, but the presence or the absence of the state as a party to the act of denying the vote does not determine the right of the plaintiff or the duty of the defendant. Both of these are determined by the nature of the election. As was said by this Court in the *Civil Rights Cases*, 109 U. S. 3, 17:

> "An individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person or commit murder, or use ruffian violence at the polls or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed."

Nixon v. *Herndon*, *supra*, also established that the Fourteenth Amendment prohibits the state from lending its protection to the deprivation of that civil right to vote in the statutory Democratic primary elections of Texas, and a Texas statute seeking to do this was stricken down as being unconstitutional.

That the civil right to vote in the statutory Democratic primary election involved in this case has been denied will not and cannot be questioned. Petitioner so alleged (R. 7) and respondent's general demurrer so admits (R. 13).

That the state of Texas has participated in and given its protection to the deprivation of petitioner's civil right to vote in the statutory Democratic primary election involved in this case is likewise clear.

(a) It cannot be disputed that the respondent, who denied the vote, was a state officer. His office of County Clerk is created by the Texas constitution (Art. 5, sec. 20). His powers and duties are fixed by statute. Chapter Two, Title 41, Articles 1935-1948, Revised Civil Statutes of Texas. His compensation is fixed by statute and comes out of public funds. Articles 3883, 3932, and 1644 of the Revised Civil Statutes of Texas. His powers and duties as the sole conductor of absentee voting in Harris County, Texas, are wholly fixed by statute. Article 2956 of the Revised Civil Statutes of Texas. Indeed, absentee voting was unknown in Texas prior to its creation by statute. See *Sterling* v. *Ferguson* (Tex. Sup.), 53 S. W. (2d) 753, 760.

(b) The judgment of the court below denying to petitioner, on account of race and color alone, redress for the deprivation of his civil right to vote in the statutory Democratic primary election involved in this case is just as much a protection of the deprivation by the State of Texas as was the statute stricken down by this Court in *Nixon* v. *Herndon, supra.*

That state judicial decisions are as much within the prohibition of the Fourteenth and Fifteenth Amendments as legislative enactments has been well settled by this Court. *Brickerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U. S. 673, 680 (and cases cited).

(c) The State of Texas has further given its protection to the deprivation of petitioner's civil right to vote by the decision of the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113, which holds that the deprivation is protected and guaranteed by the First Amendment to the Constitution of the United States and Sections 2 and 27 of Article 1 of the Constitution of Texas (pp. 119, 122).

Point Number Three

Petitioner had a right created by the Constitution of the United States to vote for United States Representative and United States Senator in the election involved in this case.

The election was a state election, and the so-called nominations were as a matter of fact equivalent to elections. See Point Number One, supra.

Section 2 of Article I of the Constitution of the United States provides in its first paragraph as follows:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for the most numerous branch of the State Legislature."

The 17th Amendment to the Constitution of the United States provides in its first paragraph as follows:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

It is admitted that petitioner had the requisite qualifications (R. 1, 13), and it has been settled by this Court, in *Wiley* v. *Sinkler*, 179, U. S. 58, 62, that

> "The right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, *but has it foundation in the Constitution of the United States.*" (Italics ours). See also *Ex Parte Yarbrough*, 110 U. S. 651, and *Swafford* v. *Templeton*, 185 U. S. 487.

What, then, is meant when the above quoted constitutional provisions say that United States Senators and Representatives shall be elected "by the people" of the several States?

Under the familiar rule, of course, resort must be had "to substance, not to form;" and the controlling principle is that laid down by this Court in *Ex Parte Yarbrough*, *supra* (p. 666), where it is said:

> "It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the *free choice of the people*, as that the original form of it should be." (Italics ours).

Can it be said that the members of Congress chosen in the election involved in this case were "the free choice of the people" of Texas?

That petitioner had no real part in the choice is beyond question.

If, then, a state provides by statute for two voting contests for the offices of United States Representatives and Senators; and if in fact one contest is equivalent to election while the other is a mere formality; and if Negroes are, with the approval of the courts of the State, denied the right to vote in the real contest; can it be said that, by naming the real contest "statutory primary election" and by naming the formal contest "general election," the state has satisfied the requirements of Section 2 of Article I and the 17th Amendment to the Constitution of the United States, which say that the members of Congress shall be elected "by the people" of the state?

If so, then, so far as Negroes are concerned, "the right to vote for members of the Congress of the United States," which "has its foundation in the Constitution of the United States," is a mere empty phrase in Texas.

The precise question here raised has not heretofore been determined by this Court. But petitioner believes, as said by this Court in *Sterling* v. *Constantin*, *supra*, that "There is no such avenue of escape from the paramount authority of the Federal Constitution."

The purpose of Section 2 of Article I and the 17th Amendment to the Constitution of the United States is obviously to guarantee to every citizen of the United States, who has the qualifications of an elector of the most numerous branch of the legislature, a real voice in the selection of the United States Congress. Whether this purpose has been achieved in any given case is, in the opinion of petitioner, purely a Federal question. That purpose cannot be met by a resort to names and labels.

True it is that Section 4 of Article I of the Constitution (before this Court in Newberry v. United States, 256 U. S. 232) provides that,

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

But this section does not purport to take away from or to give the states power to diminish or to render practically without effect or value the right of citizens to vote for members of the Congress,

which is created by the Constitution. If the state did have such power, then, instead of having "its foundation in the Constitution of the United States," the right to vote for members of the Congress of the United States would have its foundation in the uncontrolled whim of the state legislature.

In fixing "the times, places and manner of holding elections for Senators and Representatives" it seems to the petitioner obvious that "the times, places and manner" selected must in fact offer to every qualified citizen an opportunity for a reasonably fair voice in helping to fill these offices. When the state selects "times, places and manner" for these elections which either fail to provide or prevent such a reasonably fair voice in the choices to be made, then, in a proper proceeding by a citizen whose Federal right has thus been rendered impotent, the matter is one for judicial inquiry; and "To such a case the Federal judicial power extends . . . . . " *Sterling* v. *Constantin, supra,* (p. 398).

> "In determining what is due process of law regard must be had to substance, not to form." *Chicago B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 234-235.

Point Number Four

Petitioner had a right, created by the 15th Amendment to the Constitution of the United States, to "an exemption from discrimination in the exercise of the elective franchise" in the election involved in this case, "on account of race, color or previous condition of servitude;" and the 15th Amendment by its own self-operating force struck down race and color as a barrier to voting in the election involved in this case, leaving petitioner with the same right to vote in that election which was possessed by qualified voters who were not Negroes.

United States v. *Reese,* 92 U. S. 214, *Ex Parte Yarbrough,* 110 U. S. 651, and *Neal* v. *Delaware,* 103 U. S. 370, are cited in support of the first clause of this proposition, and *Guinn* v. *United States,* 238 U. S. 347, and *Myers* v. *Anderson,* 238 U. S. 368, are cited in support of the second clause.

(a) In *Ex Parte Yarbrough, supra,* (p. 665) it is said:

> "In the case of *U. S.* v. *Reese* . . . . this Court said in regard to the 15th Amendment, that 'It has invested the citizens of the United States with a new constitutional right . . . That

right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.'"

States may not discriminate against this new constitutional right created by the 15th Amendment. "A state may not discriminate against rights arising under federal laws." *McKnett* v. *St. Louis and San Francisco Railway Co.*, 292 U. S. 230, 234.

Petitioner believes it to be clear that the State of Texas has discriminated against petitioner's "new constitutional right" created by the 15th Amendment. One instance of such discrimination by the State of Texas lies in the following:

By Article 3107 of the Revised Civil Statutes of Texas, 1925, as amended, the State of Texas created certain state exemptions from discrimination in the exercise of the elective franchise in the election involved in this case, as follows:

> "Provided that no person shall ever be denied the right to participate in a primary in this state because of former political views or affiliations or because of membership or non-membership in organizations other than the political party."

In *Love* v. *Wilcox*, 28 S. W. (2d) 515, the Supreme Court of Texas held that these state exemptions were valid and enforceable in the statutory Democratic primary elections of the State.

Petitioner respectfully submits that to protect the state exemptions while refusing to protect the Federal exemption, is a discrimination against a right arising under the 15th Amendment, and is within the constitutional prohibition announced by this Court in the *McKnett Case, supra.*

This discrimination is believed by petitioner to deny him the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States, in that, manifestly, the classification of race and color is not treated by the State of Texas with the same equality of treatment as the classifications of past party affiliations and membership or non-membership in organizations other than the political party.

(b) Section 1 of the 15th Amendment provides as follows:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Guinn v. *United States* and *Myers* v. *Anderson, supra,* established beyond any further question the principle that this section of the 15th Amendment is self-enacting and that by its own self-operating force it strikes down the barriers of race and color wherever they have been set up in connection with voting to which the Amendment applies.

The limits of the occasions for voting to which the 15th Amendment applies have never been set by this Court. Mr. Chief Justice White makes no mention of what these limits are in his definition of the *"Operation and Effect of the 15th Amendment"* (*Guinn* v. *United States, supra,* p. 361). But in *Myers* v. *Anderson, supra,* when it was contended that "in any event there could not be liability under the 15th Amendment for having deprived of the right to vote at a *municipal election.*" (Italics ours), he dismissed the contention under the authority of the *Guinn Case* as being wholly without merit.

Manifestly, of course, it is not every occasion for voting that is reached by the intendment of the 15th Amendment. But the attitude of this Court in *Myers* v. *Anderson, supra,* toward a contention to set arbitrary limits to the occasions covered by the words "to vote" in the 15th Amendment, suggests to petitioner that the true rule is this,

That wherever in substantial relation to the selection of persons to fill offices of government, voting is going on under either the mandate or authority of the state, there the 15th Amendment is present to strike down by its own self-operating power any barriers of race and color which may be set up to condition the "right to vote" protected by that Amendment.

As to the substantial relation of the Texas statutory Democratic primary elections to the selection of persons to fill offices of government this Court in *Nixon* v. *Condon, supra,* (p. 88), said of the managers of such elections the following:

> "They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly."

Petitioner believes that the rule suggested by him is a reasonable

construction. The history of the 15th Amendment discloses that its purpose was to insure to every citizen a just and fair voice in the selection of public officials in the various states. The broad expressions "to vote" and "denied or abridged" seem to indicate an intent to use language suited to the purpose.

It would hardly be stretching this language to hold that voting in a "statutory primary election" which is entirely a creature of the state, *Hamilton v. Davis, supra*; in which the State has by statute fixed qualifications for voting (Articles 2955, 2956, supra) that have been respected except where Negroes offered to vote; and which is in fact the real election to fill the offices involved, is an occasion for voting in which the 15th Amendment strikes down barriers of race and color.

Nor, in the opinion of petitioner, would it be unreasonable to say that the words "denied or abridged" are broad enough to apply when, as here, the State (1) has failed to strike down those barriers of race and color in an election wholly created by it; (2) has held that the power to maintain those barriers is "guaranteed" by provisions of the State constitution—*Bell v. Hill, supra*; and (3) has set up State exemptions from other barriers to voting, which are held valid and enforceable—*Love v. Wilcox, supra*—while refusing to enforce the exemption from the barrier of race and color which is created by the 15th Amendment.

Petitioner feels it would not do violence even to the ordinary meaning of the word "abridged" to hold that such conduct of the State of Texas in connection with the statutory primary election is in fact an abridgement (a real "shortening," "lessening," "diminishing," "curtailing"—See Webster's Dictionary—a real obstacle to the value and effectiveness) of the right to vote in the so-called general election.

Point Number Five

The State Democratic Convention of Texas, which passed the resolution involved in this case, was a creature of statute, and as such was an agency of the State, which could not constitutionally do what its creator was prohibited by the Constitution of the United States from doing.

The convention was created by Article 3167 of the Revised Civil Statutes of Texas, 1925, which, as said by United States District

Judge Kennerly in *White v. The County Democratic Executive Committee*, 60 Fed. (2d) 973, "fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein."

No truer or clearer statement of the historical and factual aspects of the question involved under this point has come to petitioner's notice than that given by Judge Kennerly in the *White Case, supra*, where (p. 974) it is said concerning the resolution and the convention involved in this case:

> "Respondents, however, insist that the Democratic Party's power with respect to and its convention's power to pass such resolution, are inherent, possessed long prior to the enactment of article 3107, and in no manner derived from the State of Texas. That this was true prior to the enactment of laws in Texas regulating the political parties, etc., there is little, if any, doubt. That it not true now is certain. For a period of more than twenty-five years, the Democratic Party in Texas has, from time to time, accepted grants of power from the State, surrendered its own inherent powers, and caused to be passed laws abridging its inherent powers, until, as was said in *Briscoe Boyle* (Tex. Civ. App.) 286 S. W. 275, 276, the party has little or no discretion in the management of its party affairs. Unlike Moses, who refused to be known as the son of Pharaoh's daughter, the Democratic Party in Texas has, over a period of twenty-five years, chosen to be known as a child and agency of the State of Texas, abandoning its own inherent powers, and choosing to conduct its affairs under grants of power from the State.
>
> "It is only necessary to review the history of legislation in Texas, respecting political parties, Acts of 28th Legislature (1903), c. 101, secs. 82 to 107, p. 148, 12 Gammel's Laws of Texas; Acts of 29th Legislature (1905), 1st Called Sess., c. 11, secs. 102 to 195, p. 543, 12 Gammel's Laws of Texas; Texas Revised Civil Statutes 1911, articles 3084 to 3175 and amendments; Texas Revised Civil Statutes 1925, articles 3100 to 3173 and amendments (Vernon's Annotated Revised Civil Statutes of Texas, articles 3100 to 3173), and to review the decisions of the higher courts of Texas, construing such legislation, *Love v. Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515, 523;

Briscoe v. *Boyle* (Tex. Civ. App.) 286 S. W. 275; *Koy* v. *Schneider*, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880; *Westerman v. Mims*, 111 Tex. 29, 227 S. W. 178; *Walker v. Hopping*, (Tex. Civ. App.) 226 S. W. 146; *Dewees v. Stevens*, 105 Tex. 356, 150 S. W. 589; *Mays v. Cobb*, 100 Tex. 131, 96 S. W. 1079; Gilmore v. Waples, 108 Tex. 167, 188 S. W. 1037; *Ashford v. Goodwin*, 103 Tex. 491, 131 S. W. 535, Ann. Cas. 1913 A, 699; *Morris v. Mims*, (Tex. Civ. App.) 224 S. W. 587; *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180, L. R. A. 1917 A, 253; *Hamilton* v. *Monroe*, 116 Tex. 153, 287 S. W. 306; *Nicholson v. Scurry*, 119, Tex. 250, 28 S. W. (2d) 512; *Holzschuber v. Wurzbach* (Tex. Civ. App), 286 S. W. 289; *Love v. Buckner* (Tex. Sup.), 49 S. W. (2d) 425, to show this to be true. Add to this the provisions of the present laws, regulating in detail the affairs of political parties, and it becomes unanswerable that the convention passing this resolution was an agency of the state, in the same manner and to the same extent as the state Democratic executive committee. *Nixon v. Condon, supra. The convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting and prescribes in detail the manner of choosing those who participate therein. Article* 3167, *Texas Revised Civil Statutes* 1925." (Italics ours)

In *Bell* v. *Hill, supra*, where the resolution involved in this case was before it, the Supreme Court of Texas did not question the contention that the convention was created by Article 3167 for the purpose of electing delegates to the National Democratic Convention, but held (pp. 121-122) that this purpose was not exclusive, since "There is no limitation contained in Article 3167 with reference to declarations of policy by a State Democratic Convention called for the purpose of electing delegates to a National Convention."

This Court is not concluded, of course, by the decision of the state court that a convention which is created by a statute has both statutory and non-statutory powers, if such decision of the state court has "no fair support."

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on

which the defeated claimants are entitled to invoke the judgment of this Court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support."

Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. *Michaux*, 279 U. S. 737, 744-745.

"An attentive examination of the record discloses not only that the finding on the question of laches is without fair support in the evidence, but that the evidence conclusively refutes it." Id. p. 746.

Besides, the Supreme Court of Texas found that the source of the power to pass the resolution was Sections 2 and 27 of Article 1 of the Constitution of the State of Texas (p. 122); and petitioner respectfully submits that the convention being a creature of Article 3167, it is immaterial whether its power came from that article or from the Constitution of Texas, which is the source of the legislature's power to pass Article 3167 itself, creating the convention.

If the Texas Legislature had passed the resolution involved in this case it would have been void. *Nixon v. Herndon, supra.* Petitioner believes that it is no less void when passed by a creature of the Texas Legislature.

Point Number Six

Petitioner believes that there is not properly involved in this case any question of party membership; but that, if there is, the Democratic Party, as was true in Nixon v. Condon. 286 U. S. 73, has not yet spoken that Negroes may not be Democrats.

Nixon v. *Condon* decided three propositions, two Federal questions of law and one question of fact inhering in and necessary to a decision of the Federal questions of law. These three propositions appear from the following three quotations from *Nixon v. Condon, supra*:

(1) "Whatever our couclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which

excluded the petitioner and others of his race, *not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law.*" (p. 84, Italics ours).

(2) "The pith of the matter is simply this, that, *when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.* They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere." (p. 88, Italics ours).

(3) "*Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself. It is not concluded upon such an inquiry by decisions rendered elsewhere.* The test is not whether the members of the executive committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (p. 88, Italics ours).

Nixon v. *Condon, supra,* went off on the question of fact that assuming a question of party membership to be involved, no authorized voice of the Democratic Party had yet spoken that Negroes could not be Democrats. Specifically, this Court held as a matter of fact, determined by "the fundamental postulates of party organization," that the Texas State Democratic Executive Committee was not such an authorized voice.

(a) The Democratic Party is a *national political party;* it is not a *State political party.*

A few quotations from Bryce's The American Commonwealth will show beyond question this historical truth.

"What constitutes a party? In America, there is a simple test. Any section of men who nominate candidates of their own for the presidency and vice-presidency of the United States are

deemed a national party. Adopting this test, we shall find that there have lately been two or three *national parties in addition to the Republicans and Democrats.*" Bryce, The American Commonwealth, Vol. 2, p. 41. (Italics ours.)

"We might therefore expect that the State parties would be as distinct from the national parties as are the State Governments from the Federal.

"The contrary has happened. The national parties have engulfed the State parties. The latter have disappeared absolutely as independent bodies, and survive merely as *branches of the national parties*, working each in its own State for the tenets and purposes which a national party professes and seeks to attain." (Id., Vol. 1, p. 572. Italics ours).

"Accordingly, the national parties have complete possession of the field. In every State from Maine to Texas, all State elections for the governorship and other offices are fought on their lines; all State legislatures are divided into members belonging to one or other of them. Every trial of strength in a State election is assumed to presage a similar result in a national election. Every State office is deemed as fitting a reward for services to the national party as for services in State contests. *In fact, the whole machinery is worked exactly as if the State were merely a subdivision of the Union for electoral purposes.*" (Id., p. 574, Italics ours.)

(b) The Democratic Party being a national political party, its supreme voice is the National Democratic Convention.

In *Nixon v. Condon, supra*, this Court said the following (p. 84):

"Whatever inherent power a *State political party* has to determine the content of its membership resides in the State Convention. (Bryce, Modern Democracies, vol. 2, p. 40.)" (Italics ours.)

On page 46 of the same authority (Bryce, Modern Democracies, Vol. 2), writing to the same point with reference to *national political parties*, it is said:

"In the United States the National Convention is the supreme exponent of party doctrine and policy, universally recognized as the party oracle."

Whatever inherent power the Democratic Party has, therefore,

to determine the content of its membership resides, not in forty-eight separate and distinct and different State Democratic conventions, not even in the State Democratic Convention of Texas, as would be true if it were a state political party—but that inherent power, such as exists in America today, resides in the National Democratic Convention.

Any power which the State Democratic Convention of Texas may claim to determine the content of the membership of the Democratic Party must, therefore, necessarily come to it as a matter of delegation from the National Democratic Convention.

Petitioner alleged in his petition below that no power to exclude Negroes had been thus delegated (R. 11). The general demurrer (R. 13), of course, concedes this fact.

Not only has the National Democratic Convention not delegated any such power, but it closed its platform adopted at Chicago on June 27, 1932, (subsequent to May 24, 1932, the date of the resolution of the Texas State Democratic Convention confining membership in the Democratic Party to white people) with these words:

> "To accomplish these purposes and to recover economic liberty we pledge the nominees of this convention and the best effort of a great party whose founder announced the doctrine *which guides us now*, in the hour of our country's need *'equal rights to all, special privileges to none.'*" (World Almanac, 1933, p. 933. Italics ours.)

It is a matter of historical and general knowledge, too, that Negroes were seated in the National Democratic Convention of 1932. It is also significant that the Texas State Democratic Convention which sought by the resolution involved in this case to confine membership in the Democratic Party to the white race, was meeting pursuant to a Texas statute, Article 3167 of the Revised Civil Statutes of Texas, for the express and only purpose of electing delegates to this same National Democratic Convention of 1932. The Supreme Court of Texas states, in *Bell* v. *Hill, supra*, at page 114, that such was the nature and purpose of the State Democratic Convention, which adopted the resolution involved in this case:

> "The petition states in substance, in part, that the respondents are denying or will deny, the relators the right to vote, because of a resolution passed by the State Convention of the Demo-

cratic Party in Texas on May 24, 1932, which reads: 'Be it resolved, that all white citizens of the State who are qualified to vote under the Constitution and laws of Texas shall be eligible for membership in the party, and as such eligible for participation in the primaries.'

"This resolution was passed by the Democratic Convention which met at Houston for the purpose of electing delegates to the National Convention of the Democratic Party."

(c) The Texas State Democratic Convention had no inherent power by virtue of its being to say who may be Democrats and who may not.

"The National Convention is the supreme exponent of party doctrine and policy." Bryce, Modern Democracies, supra. As explained in Bryce's The American Commonwealth, supra, the State convention in Texas is merely a branch or subdivision of the national party, and as such is vested only with the management of the party's affairs in a single state. Except when duly authorized by the supreme voice of the Democratic Party, which it was not in this case, it has no power to exercise the supreme inherent power of the Democratic Party. The reasons were plainly stated by this Court in *Nixon* v. *Condon, supra* (p. 86), as follows:

> "The management of the affairs of a group already associated together as members of a party is obviously a very different function from that of determining who the members of the group shall be. If another view were to be accepted, a committee might rule out of the party a faction distasteful to itself, and exclude the very men who had helped to bring it into existence."

Founded by Thomas Jefferson long prior even to the Independence of Texas from Mexico, to say nothing of its statehood, the members of the Democratic Party were already associated together as a party for several decades prior to the creation of the State Democratic Convention of Texas. It follows then that this state convention could not, *ipso facto*, and by its own *ipse dixit*, and merely by receiving the privilege of itself becoming a branch of the Democratic Party, suddenly ascend into possession by virtue of its being of all of the inherent powers of the party, with full authority to rule out even those who let the Texas State Democratic Convention into the Democratic Party.

(*d*) The Texas State Democratic Convention having neither delegated nor inherent power to make race and color a test for membership in the Democratic Party, it is inescapable that whatever power it has in this regard has come to it by virtue of Sections 2 and 27 of the Bill of Rights (Article 1) of the Texas Constitution, as construed by the Supreme Court of Texas in *Bell* v. *Hill*, 74 S. W. (2d) 113.

In *Nixon* v. *Condon*, *supra*, this Court held that the State Democratic Executive Committee was an agency of the state in depriving Negroes of their vote because that committee had "excluded petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law."

The same is true of the Texas State Democratic Convention in the case at bar, and that convention is likewise, for the same reason, an agency of the state. Speaking of the convention's power, the Supreme Court of Texas said at page 122 of *Bell* v. *Hill*, *supra*;

> "We are clearly of the opinion that the resolution passed by the Democratic State Convention at Houston was a valid resolution under the power *clearly guaranteed to that body by the Bill of Rights of this State.*" (Italics ours).

In *Nixon* v. *Condon*, *supra*, this Court said of the same power claimed by the State Democratic Executive Committee, the following (p. 85):

> "If the State had not conferred it, there would be hardly color of right to give a basis for its exercise."

Likewise, when the State Democratic Convention of Texas arrogates unto itself this same power without authority from the supreme voice of the Democratic Party, petitioner respectfully submits that "if the State had not" *guaranteed* "it, there would be hardly color of right to give a basis for its exercise."

(e) This Court is not bound by decisions of the Supreme Court and Courts of Civil Appeals of Texas holding that the Texas State Democratic Convention is not an agency of government.

In *Nixon* v. *Condon*, *supra*, this Court said the following (p. 88):

> "Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will

determine for itself. *It is not concluded upon such an inquiry by decisions rendered elsewhere.*" (Italics ours.)

Not only is this ultimate Federal question open for review by this Court, but this Court may also decide for itself every other question which inheres in or is necessary to a proper decision of that Federal question. Such an incidental question is the question whether the Texas State Democratic Convention, as a branch of the Democratic Party, has the inherent power by virtue of its being to make race and color a test of being a Democrat, in the very teeth of a subsequent declaration of the National Democratic Convention—which is said by Bryce to be "the supreme exponent of party doctrine and policy"—dedicating the Democratic Party to a policy of "equal rights to all, special privileges to none."

The general principle of this Court's power and duty to decide for itself such questions has been recently restated by this Court through Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S. 378, 397, as follows:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of State power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. III, § 2) and, so extending, the court has all the authority appropriate to its exercise. *Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes*

to this Court from a State Court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right." (Italics ours.)

In the more recent case of *Johnson Oil Refining Company* v. *Oklahoma*, 290 U. S. 158, 159, this Court said:

"The Supreme Court of the State reached the conclusion that all the cars had their 'taxable situs' at the latter place. As the asserted Federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the state court has adequate support in the evidence."

Besides, the question involved is a question of general law and jurisprudence, and as to such questions this Court has always reserved the right to exercise its own independent judgment.

Swift v. *Tyson*, 10 L. Ed. 865.

Burgess v. *Seligman*, 107 U. S. 20.

Sim v. *Edenborn*, 242 U. S. 131.

See also: *Barclay* v. *Hayes*, 208 Fed. 319.

Point Number Seven

Sections 2 and 27 of the Bill of Rights (Art. 1) of the Constitution of the State of Texas, as construed by the Supreme Court of Texas in Bell v. Hill, 74 S. W. (2d) 113, and as sustained by the judgment below in the case at bar, are unconstitutional for the reason that they deny to the classification of race and color the benefits which are guaranteed to the classifications of past party affiliations and membership or non-membership in organizations other than political parties by Article 3107 of the Revised Civil Statutes of Texas, as upheld by the Supreme Court of Texas in the case of Love v. Wilcox, 28 S. W. (2d) 515.

The denial by the judgment of the court below of this claim of Federal right is not in accord with such decisions of this Court as *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, and *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, holding that where one class is favored by exemptions denied to another class under the state law, there must be some reasonable basis for the classification thus

established in order for it to meet the requirements of the equal protection clause of the Fourteenth Amendment.

That race and color cannot be made the basis of such a classification has been well settled by this Court:

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."
>
> *Nixon* v. *Herndon*, 273 U. S. 536, 541.

It should be kept in mind also under this point that we are not dealing with a convention formed at the instance or suggestion of private individuals upon their own volition. But, on the contrary, as said by United States District Judge Kennerly in *White v. The County Democratic Executive Committee, supra*, "the convention itself is a creation of a statute which fixes the time of its meeting, the purpose of its meeting, and prescribes in detail the manner of choosing those who participate therein. Article 3167, Texas Revised Civil Statutes 1925." Moreover, as said by the Supreme Court of Texas in *Sterling* v. *Ferguson*, 53 S. W. (2d) 753, 760, the election involved is a "statutory primary election."

And it is in such a *statutory* election and to such a *statutory creature* that Sections 2 and 27 of the Texas Bill of Rights guarantee the power to make race and color a qualification and test of voting, while Article 3107 of the Revised Civil Statutes, held valid by the Texas Supreme Court in *Love* v. *Wilcox*, 28 S. W. (2d) 515, exempts from such discrimination the classifications of past party affiliations (the traditional test of party loyalty) and membership or non-membership in organizations other than the political party.

So, whatever may be the rights and privileges of men whose own minds and volitions bring them together, at a time, and in a manner, and for purposes which they themselves privately decide upon, it is obvious that the public welfare demands a different standard of duty from men who meet together "by virtue of" and "under the terms of" a state statute (see *Bell* v. *Hill, supra*, pp. 114, 121), especially when, as such a creation of a statute they possess "power clearly guaranteed" (see *Bell v. Hill, supra*, p. 122) by the state law to make race and color a test of voting in a "statutory" election.

CONCLUSION

Neither the petitioner, nor the approximately one million Negroes of Texas and ten million Negroes of the South, whose lives and destines will in a very real sense be affected by the decision in this case, asks any special favors at the hands of this Court. In this regard petitioner and the other twelve million Negroes of this nation are willing to stand or fall upon the century and more old principle, announced by Thomas Jefferson in founding the Democratic Party, re-pledged in the platform upon which the American people gave to that party the mandate under which it now is entrusted with the power to administer this Government,—but which is sought to be repudiated and subverted in this case, with the backing, more real than fancied, of the State of Texas,—"equal rights to all, special privileges to none."

All that is asked is that this Court may vouchsafe that the great constitutional guaranties here involved may not be frittered away by devices of names and labels; and to this end that this Court may use the "great restraints of the Constitution" to again "level by its judgment" the barriers of race and color which are disclosed by the record in this case.

Petitioner therefore prays that the judgment below may be reversed, with such instructions as to this Court may seem proper.

Respectfully submitted,

J. Alston Atkins
Carter W. Wesley
Counsel for Petitioner

A. S. Wells
F. S. K. Whittaker
Of Counsel

Appendix 1

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

No. 994. Law.

L. A. NIXON, Plaintiff

vs.

C. C. HERNDON AND CHARLES PORRAS, Defendants

Now, on this 1st day of February, A. D. 1928, at a regular term of this court came on regularly to be heard the above styled and numbered cause. The plaintiff, L. A. Nixon, appeared in person and by counsel and announced ready for trial, and the defendants, C. C. Herndon and Chas. Porras, having been duly and legally served with notice, appeared not, but wholly made default. Whereupon came the jury, composed of Jake Kaufman and eleven other good and lawful men, who were impanelled and sworn to try the issues in said cause, and after having heard the pleadings read, and the evidence submitted by the plaintiff, and the argument of counsel, the court instructed the jury to find the issues in favor of the plaintiff, and the jury returned the following verdict: "We, the jury under instructions of the court, find for the plaintiff L. A. Nixon, against the defendants, C. C. Herndon and Chas. Porras, in the sum of one dollar. Jake Kaufman, Foreman."

And in accordance therewith the Court doth find: That the law and the evidence is with the plaintiff; that the plaintiff was denied the right to vote at the Primary Election on July 26, 1924, for candidates for office upon the Democratic ticket, by the defendants, and that said refusal was a denial to the plaintiff of his rights, and that plaintiff is damaged, and the Court finds his measure of damages to be $1.00.

It is therefore ordered, adjudged and decreed by the court that the plaintiff, L. A. Nixon, have and recover of and from the defendants, C. C. Herndon and Charles Porras, the sum of $1.00, and costs of suit. For which let execution issue.

(Signed) Charles A. Boynton, Judge.

Endorsed: No. 994. In the District Court of the United States Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants. Judgment.

Filed Feb. 1, 1928 (El Paso Division). D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 20, page 108.

UNITED STATES OF AMERICA
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing on 1½ pages, is a true and correct copy of the Judgment in cause No. 994-Law, styled L. A. Nixon, Plaintiff, vs. C. C. Herndon and Charles Porras, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk.
(Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

No. 1379. Law.

L. A. NIXON, Plaintiff

vs.

JAMES CONDON AND C. H. KOLLE. Defendants.

This cause coming on to be heard on this the 15th day of October, A. D. 1932, in open court, the plaintiff being present in person and by his attorneys, Fred C. Knollenberg and E. F. Cameron, and the defendants being present by their attorney, Ben R. Howell, and a jury being waived, all matters of fact as well as of law was submitted to the court; and the court having heard the pleadings read, and being fully advised in the premises doth find that the law and the facts are with the plaintiff who is entitled to recover a judgment against the defendants for having been deprived of his righ. to vote in the Democratic Primaries, thereupon the attorneys announced in court that they had agreed that

a judgment might be rendered for the amount of One Dollar ($1.00).

It is, therefore, ordered, adjudged and decreed that plaintiff, L. A. Nixon, have and recover of and from James Condon and C. H. Kolle the sum of One Dollar ($1.00) and all costs in this cause incurred.

(Signed) Charles A. Boynton, Judge. Form O. K. Howell.

Endorsed: No. 1379—Law. In the District Court of the United States for the Western District of Texas, El Paso Division. L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants. Judgment. Filed October 15, 1932. D. H. Hart, Clerk, by (signed) J. F. Caroline, Deputy. Volume 27, page 391.

UNITED STATES OF AMERICA,
Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1379—Law, styled L. A. Nixon, Plaintiff, vs. James Condon and C. H. Kolle, Defendants, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk.
(Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 3

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

October Term, A. D. 1933.

No. 1660. Law.

L. A. NIXON, Plaintiff

v.

GEORGE L. McCANN AND FRANK BRENK, Defendants.

This cause coming on to be heard on this the 7th day of February, A. D. 1934, and all parties having heretofore filed a written stipulation waving a jury and agreeing to submit all matters of

fact, as well as of law, to the court, and in open court announced ready for trial;

And the court having heard the pleadings read and the evidence submitted and the arguments in support thereof, is of the opinion that the law and the evidence is with the plaintiff and he ought to have and recover of and from the defendants his damages against the defendants in the sum of Five Dollars.

It is, therefore, ordered, adjudged, and decreed, that plaintiff have and recover of and from the defendants judgment in the sum of Five Dollars, together with all costs of this proceeding, for which let plaintiff have his execution.

Done, at El Paso, Texas, at this the October Term, A. D. 1933.

(Signed) Charles A. Boynton, Judge. Approved: Ben R. Howell, R. L. Holliday, Atty's. for Def't.

Endorsed: No. 1660—Law. L. A. Nixon vs. George L. McCann and Frank Brenk. Judgment. Filed for record February 7, 1934 (El Paso Division.) D. H. Hart, Clerk, U. S. District Court, West. Dist. of Texas, by (signed) Flora L. Linker, Deputy Clerk. Volume 29, Page 569.

UNITED STATES OF AMERICA,

Western District of Texas, ss:

I, D. H. Hart, Clerk of the District Court of the United States of America for the Western District of Texas, do hereby certify that the foregoing, on one page, is a true and correct copy of the Judgment in cause No. 1660—Law, styled L. A. Nixon, plaintiff, vs. George L. McCann and Frank Brenk, as the same appears on file and of record in this office.

Witness my official signature and the seal of said Court hereto affixed, at office in the City of El Paso, Texas, this 16th day of October, A. D. 1934.

D. H. Hart, Clerk, by Margarita Gameros, Deputy Clerk. (Seal U. S. District Court, Western District of Texas, El Paso.)

Appendix 4

Sections 8, 16, and 19 of Article 5, Constitution of Texas:

"SEC. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all

cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.

"The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. (Sec. 8, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

"Sec. 16. The County Court shall have original judisdiction of all misdemeanors of which exclusive original jurisdiction is not given to the Justices Court as the same is now or may hereafter be prescribed by law, and when the fine to be imposed shall exceed $200, and they shall have exclusive jurisdiction in all civil cases when the matter in controversy shall exceed in value $200, and not $500, exclusive of interest, and concurrent jurisdiction with the District Court when the matter in controversy shall exceed $500, and not exceed $1,000, exclusive of interest, but shall not have jurisdiction of suits for the recovery of land. They shall have

appellate jurisdiction in cases civil and criminal of which Justices Courts have original jurisdiction, but of such civil cases only when the judgment of the court appealed from shall exceed $20, exclusive of cost, under such regulations as may be prescribed by law. In all appeals from Justices Courts there shall be a trial *de novo* in the County Court, and appeals may be prosecuted from the final judgment rendered in such cases by the County Court, as well as all cases civil and criminal of which the County Court has exclusive or concurrent original jurisdiction of civil appeals in civil cases to the Court of Civil Appeals and in such criminal cases to the Court of Criminal Appeals, with such exceptions and under such regulations as may be prescribed by law.

"The County Court shall have the general jurisdiction of a Probate Court; they shall probate wills, appoint guardians of minors, idiots, lunatics, persons *non compos mentis* and common drunkards, grant letters testamentary and of administration, settle accounts of executors, transact all business appertaining to deceased persons, minors, iodits, lunatics, persons *non compos mentis* and common drunkards, including the settlement, partition and distribution of estates of deceased persons and to apprentice minors, as provided by law; and the County Court, or judge thereof, shall have power to issue writs of injunction, mandamus and all writs necessary to the enforcement of the jurisdiction of said Court, and to issue writs of *habeas corpus* in cases where the offense charged is within the jurisdiction of the County Court, or any other court or tribunal inferior to said Court. The County Court shall not have criminal jurisdiction in any county where there is a Criminal District Court, unless expressly conferred by law, and in such counties appeals from Justices Courts and other inferior courts and tribunals in criminal cases shall be to the Criminal District Court, under such regulations as may be prescribed by law; and in all such cases an appeal shall lie from such District Court to the Court of Criminal Appeals. When the judge of the County Court is disqualified in any case pending in the County Court the parties interested may, by consent, appoint a proper person to try said case, or upon their failing to do so a competent person may be appointed to try the same in the county where it is pending in such manner as may be prescribed by law. (Sec. 16, Art. 5, adopted election August 11, 1891;

proclamation September 22, 1891.)"

"SEC. 19. Justices of the peace shall have jurisdiction in criminal matters of all cases where the penalty or fine to be imposed by law may not be more than for two hundred dollars, and in civil matters of all cases where the amount in controversy is two hundred dollars or less, exclusive of interest, of which exclusive original jurisdiction is not given to the District or County Courts; and such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law; and appeals to the County Courts shall be allowed in all cases decided in Justices' Courts where the judgment is for more than twenty dollars exclusive of costs; and in all criminal cases under such regulations as may be prescribed by law. And the justices of the peace shall be *ex officio* notaries public. And they shall hold their courts at such times and places as may be provided by law."

Appendix 5

Articles 1906-1911, Revised Civil Statutes of Texas, 1925

Art. 1906. (1705) (1098) (1117) Original jurisdiction.

"The district court shall have original jurisdiction in civil cases of:

"1. Suits in behalf of the State to recover penalties, forfeitures and escheats.

"2. Cases of divorce and dissolution of marriage.

"3. Suits to recover damages for slander or defamation of character.

"4. Suits for the trial of title to land and for the enforcement of liens thereon.

"5. Suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

"6. Suits, complaints or pleas, without regard to any distinction between law and equity, when the matter in controversary (controversy) shall be valued at or amount to five hundred dollars exclusive of interest.

"7. Contested elections. (Const., Art. 5.)"

Art. 1907. (1706) (1099) (1118) Matters of Probate.

"District courts shall have appellate jurisdiction and general

control in probate matters over the county courts, for appointing guardians, granting letters testamentary and of administration, probating wills, settling accounts of executors, administrators and guardians, and for the transaction of business appertaining to estates. The district court shall also have such original jurisdiction and general control over executors, administrators, guardians and minors as provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 200; P. D. 1406; Amendment 1891.)"

Art. 1908. (1706) (1099) (1118) Over Commissioners Court.

"Such court shall also have appellate jurisdiction and general supervisory control over the commissioners court, with such exceptions and under such regulations as may be prescribed by law. (Id.)"

Art. 1909 (1706) (1099) (1118) General Jurisdiction.

"Such court shall have general original jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or the constitution, and such other jurisdiction, original and appellate as may be provided by law. (Const., Art. 5, sec. 8; Acts 1846, p. 22; P. D. 1406.)"

Art. 1910. (1707) (1100) (1119) Motions against sheriffs, attorneys, etc.

"The district court shall have power to hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys, collected under the process of said court, or other defalcation of duty in connection with such process and of motions against attorneys for moneys collected by them and not paid over. (Acts 1846, p. 201, sec. 5; P. D. 1408; G. L., Vol. 2, p. 1507.)"

Art. 1911. (1708) (1101) (1120) May punish for contempt.

"The district court may punish any person guilty of contempt of such court by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days. (Acts 1846, p. 201; P. D. 1409; G. L., Vol. 2, p. 1507.)"

Appendix 6

Articles 1949-1960, Revised Civil Statutes of Texas, 1925

Article 1949. (1763) (1154) (1161) Exclusive original jurisdiction.

"The county court shall have exclusive original jurisdiction in

civil cases where the matter in controversary (controversy) shall exceed in value two hundred dollars, and shall not exceed five hundred dollars, exclusive of interest. (Const., Art. 5, sec. 16: Acts 1876, p. 172; G. L., Vol. 8, p. 1008.)"

Art. 1950. (1764) (1155) (1162) Concurrent original jurisdiction.

"The county court shall have concurrent jurisdiction with the district court when the matter in controversy shall exceed five hundred and not exceed one thousand dollars, exclusive of interest. (Id.)"

Art. 1951. (1766) (1157) (1164) No jurisdiction.

"The county court shall not have jurisdiction of any suit to recover damages for slander or defamation of character, nor of suits of the recovery of lands, nor suits for the enforcement of liens upon land, nor of suits in behalf of the State for escheats, nor of suits for divorce, nor of suits for the forfeiture of the charters of corporations and incorporated companies, nor of suits for the trial of the right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars. (Id.)"

Art. 1952) (1767) (1158) (1165) Appellate jurisdiction.

"The county court shall have appellate jurisdiction in civil cases over which the justice courts have original jurisdiction when the judgment appealed from or the amount in controversy shall exceed twenty dollars exclusive of costs. (Id.)"

Art. 1953. (1768) (1159) (1166) Certiorari to justice courts.

"The county court shall also have jurisdiction in cases brought up from the justice courts by certiorari."

Art. 1954. (1769) (1160) (1167) Motions against officers.

"The county court may hear and determine all motions against sheriffs and other officers of the court for failure to pay over moneys collected under the process of said court, or other defalcation of duty in connection with such process. (Acts 1876, p. 23; G. L., Vol. 8, p. 859.)"

Art. 1955. (1770) (1161) (1168) To punish for contempt.

"The county court may punish, by fine not exceeding one hundred dollars, and by imprisonment not exceeding three days, persons

"Subject to the limitation stated in this chapter, the county court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them. (Id.; P. D. 1410.)"

Art. 1957. (1772) (1163) 1170) To grant remedial writs.

"The county judge, either in term time or vacation, may grant writs of mandamus, injunction, sequestration, attachment, garnishment, certiorari and supersedeas, and all other writs necessary to the enforcement of the jurisdiction of the court. (Const., Art. 5, sec. 16; Acts 1876, p. 19; G. L., Vol. 8, p. 855.)"

Art. 1958. (1773) (1164) (1171) Appointing attorneys.

"The county judge may appoint counsel to attend to the cause of any party who makes affidavit that he is too poor to employ counsel to attend to the same. (Acts 1846, p. 200, sec. 11; P. D. 1414; G. L., Vol. 2, 1506.)"

Art. 1959. (1774) (1165) (1172) Additional authority.

"The county court and the county judge shall also have such authority as may be vested in them by law."

Art. 1960. (1775) (1166) Changed jurisdiction; eminent domain.

"Where the jurisdiction of a county court has been taken away, altered or changed by existing laws, the same shall remain as established, until otherwise provided by law. Jurisdiction shall obtain in all matters of eminent domain over which the county courts have jurisdiction by the general laws of this State. (Acts 1885, p. 77; G. L., Vol. 9, p. 697.)"

Appendix 7

Articles 2385-2387, 2454, 2460, Revised Civil Statutes of Texas, 1925

Art. 2385. (2291) (1568) (1539) Jurisdiction.

"Justice courts shall, in addition to their other powers and duties, have and exercise original jurisdiction in civil matters of

all cases where the amount in controversy is two hundred dollars, or less, exclusive of interest, of which exclusive original jurisdiction is not given to the district or county courts, and of cases of forcible entry and detainer, and to foreclose mortgages and enforce liens on personal property, where the amount in controversy is within their jurisdiction. (Const., Art. 5, sec. 19; Acts 1876, p. 155; G. L., Vol. 8, p. 991.)"

Art. 2386. (2293-4-5-7) Other powers.

"Justices of the peace shall also have power:

"1. To punish any party guilty of a contempt of court by fine not to exceed twenty-five dollars and by imprisonment not exceeding one day.

"2. To issue writs of attachment, garnishment and sequestration within their jurisdiction, the same as judges and clerks of the district and county courts.

"3. To exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this State.

"4. To proceed with all unfinished business of his office in like manner as if such business had been originally commenced before him."

Art. 2387. (2296) (1573) (1544) No jurisdiction.

"Justice courts have no jurisdiction of suits in behalf of the State to recover penalties, forfeitures and escheats, of suits for divorce, of suits to recover damages for slander or defamation of character, suits for the trial of title to land, or of suits for the enforcement of liens on land. (Const., Art. 5, sec. 8.)"

Art. 2454. (2391) (1663) (1638) Appeal.

"A party to a final judgment in any justice court may appeal therefrom to the county court where such judgment, or the amount in controversy, shall exceed twenty dollars exclusive of costs, and in such other cases as may be expressly provided by law. (Acts 1876, p. 154; G. L., Vol. 8, p. 990.)

Art. 2460. (2398-99) Certiorari.

"A cause tried before a justice, wherein the amount in controversy or the judgment exceeds twenty dollars, exclusive of costs, may be removed from such justice court to the county court by

certiorari under the rules prescribed in the title and chapter relating thereto. Whenever a writ of certiorari to remove any cause from the justice court to the county court shall be served on any justice of the peace, he shall immediately make out a certified copy of the entries made on his docket, and of the bill of costs, as provided in case of appeals, and send same, together with the original papers in the cause, to the clerk of the county court in the manner and within the time prescribed in the preceding article."

Appendix 8

Sections 3 and 6 of Article 5, Constitution of Texas.

"Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a Statute of the State is held void. The Supreme Court and the Justices thereof shall have the power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

"The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction. The Supreme Court shall sit for the transaction of business from the first Monday in October of each year until the last Saturday of June in the next year, inclusive, at the capital of the State.

"The Supreme Court shall appoint a clerk, who shall give bond

in such a manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. (Sec. 3, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891)."

"Sec. 6. The Legislature shall as soon as practicable after the adoption of this amendment divide the State into not less than two nor more than three Supreme Judicial districts and thereafter into such additional districts as the increase of population and business may require, and shall establish a Court of Civil Appeals in each of said districts, which shall consist of a Chief Justice and two Associate Justices, who shall have the qualifications as herein prescribed for Justices of the Supreme Court. Said Court of Civil Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all civil cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.

"Each of said Courts of Civil Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a (a) term of six years and shall receive for their services the sum of three thousand five hundred dollars per annum, until otherwise provided by law. Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law. Each Court of Civil Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

"Until the organization of the Courts of Civil Appeals and Criminal Appeals, as herein provided for, the jurisdiction, power and organization and location of the Supreme Court, the Court of Appeals and the Commission of Appeals shall continue as they were before the adoption of this amendment.

"All civil cases which may be pending in the Court of Appeals shall as soon as practicable after the organization of the Courts of

Civil Appeals be certified to, and the records thereof transmitted to the proper Courts of Civil Appeals to be decided by said courts. At the first session of the Supreme Court the Court of Criminal Appeals and such of (of) the Courts of Civil Appeals which may be hereafter created under this article after the first election of the Judges of such courts under this amendment. The terms of office of the Judges of each court shall be divided into three classes. Those who shall draw class No. 1 shall hold their offices two years, those drawing class No. 2 shall hold their offices for four years, and those who may draw class No. 3 shall hold their offices for six years, from the date of their election and until their successors are elected and qualified, and thereafter each of the said Judges shall hold his office for six years, as provided in this Constitution. (Sec. 6, Art. 5, adopted election August 11, 1891; proclamation September 22, 1891.)"

Appendix 9

Articles 1728 and 1819, (as amended) Revised Civil Statutes of Texas, 1925.

Art. 1728. (1521) (940) (1011) Appellate jurisdiction.

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

"1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

"2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any question of law.

"3. Those involving the construction or the validity of statutes necessary to a determination of the case.

"4. Those involving the revenues of the State.

"5. Those in which the Railroad Commission is a party.

"6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

"Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion, refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error." (Acts 1927, 40th Leg., p. 214, ch. 144.)

"Art. 1819. (1589), (996). Jurisdiction defined.

The appellate jurisdiction of the Courts of Civil Appeals shall extend to all civil cases within the limits of their respective districts of which the District Courts and County Courts have or assume jurisdiction when the amount in controversy or the judgment rendered shall exceed One Hundred Dollars exclusive of interest and costs." (As amended Acts 1929, 41st Leg., p. 68, ch. 33, § 1.)

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1934.

R. R. Grovey, Petitioner,
vs.
Albert Townsend.

On Writ of Certiorari to the Justice Court, Precinct No. 1, Harris County, Texas.

[April 1, 1935.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner, by complaint filed in the Justice Court of Harris County, Texas, alleged that although he is a citizen of the United States and of the State and County, and a member of and believer in the tenets of the Democratic party, the respondent, the county clerk, a state officer, having as such only public functions to perform, refused him a ballot for a Democratic party primary election, because he is of the negro race. He demanded ten dollars damages. The pleading quotes articles of the Revised Civil Statutes of Texas which require the nomination of candidates at primary elections by any organized political party whose nominees received one hundred thousand votes or more at the preceding general election, and recites that agreeably to these enactments a Democratic primary election was held on July 28, 1934, at which petitioner had the right to vote. Referring to statutes which regulate absentee voting at primary elections, the complaint states the petitioner expected to be absent from the county on the date of the primary election, and demanded of the respondent an absentee ballot, which was refused him in virtue of a resolution of the state Democratic convention of Texas, adopted May 24, 1932, which is:

"Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations."

The complaint charges that the respondent acted without legal excuse and his wrongful and unlawful acts constituted a violation of the Fourteenth and Fifteenth Amendments of the federal constitution.

A demurrer, assigning as reasons that the complaint was insufficient in law and stated no cause of action, was sustained; and a motion for a new trial, reasserting violation of the federal rights mentioned in the complaint, was overruled. We granted certiorari,[1] because of the importance of the federal question presented, which has not been determined by this court.[2] Our jurisdiction is clear, as the Justice Court is the highest state court in which a decision may be had,[3] and the validity of the constitution and statutes of the state was drawn in question on the ground of their being repugnant to the Constitution of the United States.[4]

The charge is that respondent, a state officer, in refusing to furnish petitioner a ballot, obeyed the law of Texas, and the consequent denial of petitioner's right to vote in the primary election because of his race and color was state action forbidden by the federal constitution; and it is claimed that former decisions require us so to hold. The cited cases are, however, not in point. In *Nixon* v. *Herndon*, 273 U. S. 536, a statute which enacted that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas," was pronounced offensive to the Fourteenth Amendment. In *Nixon* v. *Condon*, 286 U. S. 73, a statute was drawn in question which provided that "every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party." We held this was a delegation of state power to the state executive committee and made its determination conclusive irrespective of any expression of the party's will by its convention, and therefore the committee's action barring negroes from the party primaries was state action prohibited by the Fourteenth Amendment. Here the qualifications of citizens to participate in party counsels and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face

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[1] 293 U. S. —.

[2] Rule 38, 5 (a).

[3] *Dowham* v. *Alexandria*, 9 Wall. 659; *Tinsley* v. *Anderson*, 171 U. S. 101. Constitution of Texas, Article V, Sections 3, 6, 8, 16 and 19. Revised Civil Statutes of Texas of 1925, Articles 1906-1911, 2385-2387, 2454, 2460. *Gulf, etc. R. Co.* v. *Rawlins*, 80 Texas 579; *Hudson* v. *Smith*, 133 S. W. 486; *Arrington* v. *People's Supply Co.*, 52 S. W. (2d) 678.

[4] U. S. C. Tit. 28, Sec. 344 (b).

is not state action. The question whether under the constitution and laws of Texas such a declaration as to party membership amounts to state action was expressly reserved in *Nixon* v. *Condon, supra*, pp. 84-85. Petitioner insists that for various reasons the resolution of the state convention limiting membership in the Democratic party in Texas to white voters does not relieve the exclusion of negroes from participation in Democratic primary elections of its true nature as the act of the state.

First. An argument pressed upon us in *Nixon* v. *Condon, supra*, which we found it unnecessary to consider, is again presented. It is that the primary election was held under statutory compulsion; is wholly statutory in origin and incidents; those charged with its management have been deprived by statute and judicial decision of all power to establish qualifications for participation therein inconsistent with those laid down by the laws of the state, save only that the managers of such elections have been given the power to deny negroes the vote. It is further urged that while the election is designated that of the Democratic party, the statutes not only require this method of selecting party nominees, but define the powers and duties of the party's representatives and of those who are to conduct the election so completely, and make them so thoroughly officers of the state, that any action taken by them in connection with the qualifications of members of the party is in fact state action and not party action.

In support of this view petitioner refers to Title 50 of the Revised Civil Statutes of Texas of 1925,[3] which by Article 2930, requires that any party whose members cast more than one hundred thousand ballots at the previous election, shall nominate candidates through primaries, and fixes the date at which they are to be held; by Article 2939 requires primary election officials to be qualified voters; by Article 2955 declares the same qualifications for voting in such an election as in the general elections; by Article 2956 permits absentee voting as in a general election; by Article 2978 requires that only an official ballot shall be used, as in a general election; by Articles 2980-2981 specifies the form of ballot and how it shall be marked, as other sections do for general elections; by Article 2984 fixes the number of ballots to be provided, as another

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[3]Vernon's Annotated Revised Civil and Criminal Statutes, Vol. 9, p. 3ff; *Id.*, January 1935 Cumulative Supplement, pp. 117, 118.

article does for general elections; by Articles 2986, 2987 and 2990 permits the use of voting booths, guard rails, and ballot boxes which by other statutes are provided for general elections; by Articles 2998 and 3104 requires the officials of primary elections to take the same oath as officials at the general elections; by Article 3002 defines the powers of judges at primary elections; by Articles 3003-3025 provides elaborately for the purity of the ballot box; by Article 3028 commands that the sealed ballot boxes be delivered to the county clerk after the election, as is provided by another article for the general election; and by Article 3041 confers jurisdiction of election contests upon district courts, as is done by another article with respect to general elections. A perusal of these provisions so it is said, will convince that the state has prescribed and regulated party primaries as fully as general elections, and has made those who manage the primaries state officers subject to state direction and control.

While it is true that Texas has by its laws elaborately provided for the expression of party preference as to nominees, has required that preference to be expressed in a certain form of voting, and has attempted in minute detail to protect the suffrage of the members of the organization against fraud, it is equally true that the primary is a party primary; the expenses of it are not borne by the state, but by members of the party seeking nomination (Arts. 3108; 3116); the ballots are furnished not by the state, but by the agencies of the party (Arts. 3109; 3119); the votes are counted and the returns made by instrumentalities created by the party (Arts. 3123; 3124-5; 3127); and the state recognizes the state convention as the organ of the party for the declaration of principles and the formulation of policies (Arts. 3136; 3139).

We are told that in *Love* v. *Wilcox*, 119 Texas 256, the Supreme Court of Texas held the state was within its province in prohibiting a party from establishing past party affiliations or membership in non-political organizations as qualifications or tests for participation in primary elections, and in consequence issued its writ of mandamus against the members of the state executive committee of the Democratic party on the ground that they were public functionaries fulfilling duties imposed on them by law. But in that case it was said (p. 272):

"We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall

participate as voters or candidates in its conventions or primaries. We have no such state of facts before us."

After referring to Article 3107, which limits the power of the state executive committee of a party to determine who shall be qualified to vote at primary elections, the court said:

"The Committee's discretionary power is further restricted by the statute directing that a single, uniform pledge be required of the primary participants. The effect of the statutes is to decline to give recognition to the lodgment of power in a State Executive Committee, to be exercised at its discretion."

Although it did not pass upon the constitutionality of Section 3107, as we did in *Nixon* v. *Condon, supra,* the Court thus recognized the fact upon which our decision turned, that the effort was to vest in the state executive committee the power to bind the party by its decision as to who might be admitted to membership.

In *Bell* v. *Hill,* 74 S. W. (2d) 113, the same court, in a mandamus proceeding instituted after the adoption by the state convention of the resolution of May 24, 1932, restricting eligibility for membership in the Democratic party to white persons, held the resolution valid and effective. After a full consideration of the nature of political parties in the United States, the court concluded that such parties in the state of Texas arise from the exercise of the free will and liberty of the citizens composing them; that they are voluntary associations for political action, and are not the creatures of the state; and further decided that Sections 2 and 27 of Article 1 of the State Constitution guaranteed to citizens the liberty of forming political associations, and the only limitation upon this right to be found in that instrument is the clause which requires the maintenance of a republican form of government. The statutes regulating the nomination of candidates by primaries were related by the court to the police power, but were held not to extend to the denial of the right of citizens to form a political party and to determine who might associate with them as members thereof. The court declared that a proper view of the election laws of Texas, and their history, required the conclusion that the Democratic party in that state is a voluntary political association and, by its representatives assembled in convention, has the power to determine who shall be eligible for membership and, as such, eligible to participate in the party's primaries.

We cannot, as petitioner urges, give weight to earlier expressions of the state courts said to be inconsistent with this declaration of the law. The Supreme Court of the state has decided, in a case definitely involving the point, that the legislature of Texas has not essayed to interfere, and indeed may not interfere, with the constitutional liberty of citizens to organize a party and to determine the qualifications of its members. If in the past the legislature has attempted to infringe that right and such infringement has not been gainsaid by the courts, the fact constitutes no reason for our disregarding the considered decision of the state's highest court. The legislative assembly of the state, so far as we are advised, has never attempted to prescribe or to limit the membership of a political party, and it is now settled that it has no power so to do. The state, as its highest tribunal holds, though it has guaranteed the liberty to organize political parties, may legislate for their governance when formed and for the method whereby they may nominate candidates, but must do so with full recognition of the right of the party to exist, to define its membership, and to adopt such policies as to it shall seem wise. In the light of the principles so announced, we are unable to characterize the managers of the primary election as state officers in such sense that any action taken by them in obedience to the mandate of the state convention respecting eligibility to participate in the organization's deliberations, is state action.

Second. We are told that Sections 2 and 27 of the Bill of Rights of the Constitution of Texas as construed in *Bell* v. *Hill, supra,* violate the federal Constitution, for the reason that so construed they fail to forbid a classification based upon race and color, whereas in *Love* v. *Wilcox, supra,* they were not held to forbid classifications based upon party affiliations and membership or non-membership in organizations other than political parties, which classifications were by Article 3107 of Revised Civil Statutes, 1925, prohibited. But, as above said, in *Love* v. *Wilcox* the court did not construe or apply any constitutional provision and expressly reserved the question as to the power of a party in convention assembled to specify the qualifications for membership therein.

Third. An alternative contention of petitioner is that the state Democratic convention which adopted the resolution here involved

was a mere creature of the state and could not lawfully do what the federal Constitution prohibits to its creator. The argument is based upon the fact that Article 3167 of the Revised Civil Statutes of Texas, 1925, requires a political party desiring to elect delegates to a national convention, to hold a state convention on the fourth Tuesday of May, 1928, and every four years thereafter; and provides for the election of delegates to that convention at primary conventions, the procedure of which is regulated by law. In *Bell* v. *Hill*, *supra*, the Supreme Court of Texas held that Article 3167 does not prohibit declarations of policy by a state Democratic convention called for the purpose of electing delegates to a national convention. While it may be, as petitioner contends, that we are not bound by the state court's decision on the point, it is entitled to the highest respect, and petitioner points to nothing which in any wise impugns its accuracy. If, as seems to be conceded, the Democratic party in Texas held conventions many years before the adoption of Article 3167, nothing is shown to indicate that the regulation of the method of choosing delegates or fixing the times of their meetings, was intended to take away the plenary power of conventions in respect of matters as to which they would normally announce the party's will. Compare *Nixon* v. *Condon*, *supra*, 84. We are not prepared to hold that in Texas the state convention of a party has become a mere instrumentality or agency for expressing the voice or will of the state.

Fourth. The complaint states that candidates for the offices of Senator and Representative in Congress were to be nominated at the primary election of July 9, 1934, and that in Texas nomination by the Democratic party is equivalent to election. These facts (the truth of which the demurrer assumes) the petitioner insists, without more, make out a forbidden discrimination. A similar situation may exist in other states where one or another party includes a great majority of the qualified electors. The argument is that as a negro may not be denied a ballot at a general election on account of his race or color, if exclusion from the primary renders his vote at the general election insignificant and useless, the result is to deny him the suffrage altogether. So to say is to confuse the privilege of membership in a party with the right to vote for one who is to hold a public office. With the former the state need have no concern, with the latter it is bound to concern itself, for the general election is a function of the state government

and discrimination by the state as respects participation by negroes on account of their race or color is prohibited by the federal constitution.

Fifth. The complaint charges that the Democratic party has never declared a purpose to exclude negroes. The premise upon which this conclusion rests is that the party is not a state body but a national organization, whose representative is the national Democratic convention. No such convention, so it is said, has resolved to exclude negroes from membership. We have no occasion to determine the correctness of the position, since even if true it does not tend to prove that the petitioner was discriminated against or denied any right to vote by the State of Texas. Indeed the contention contradicts any such conclusion, for it assumes merely that a state convention, the representative and agent of a state association, has usurped the rightful authority of a national convention which represents a larger and superior country-wide association.

We find no ground for holding that the respondent has in obedience to the mandate of the law of Texas discriminated against the petitioner or denied him any right guaranteed by the Fourteenth and Fifteenth Amendments.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.